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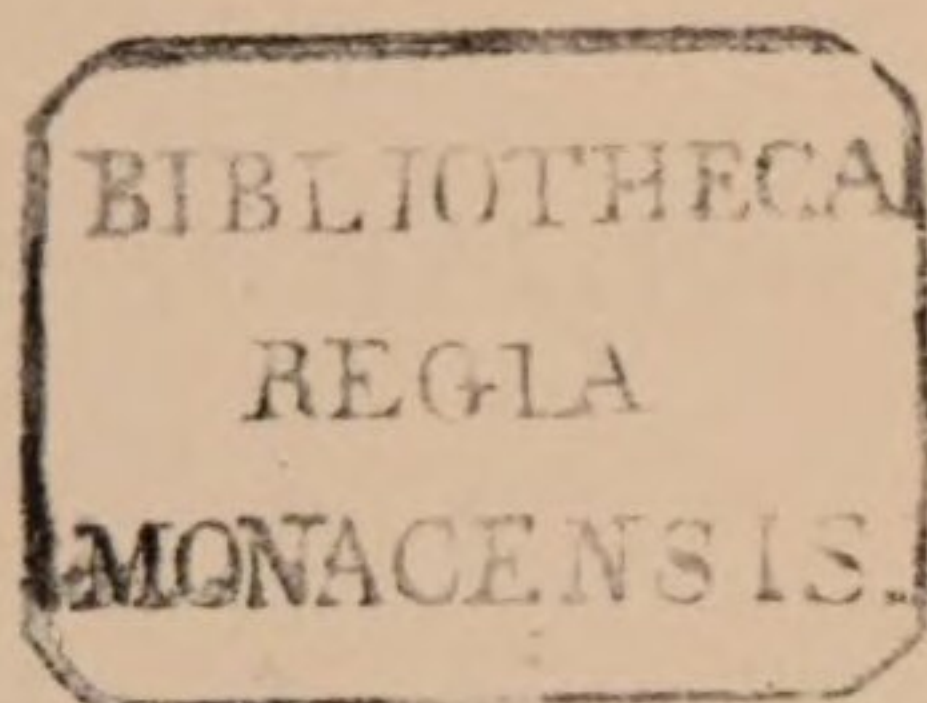
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TO
THE RIGHT HON. LORD WESTBURY,
Lord High Chancellor of Great Britain,
ETC. ETC. ETC.,

WHOSE UNWEARIED EXERTIONS IN THE PROMOTION OF LEGAL
EDUCATION AMONG OUR INNS OF COURT,

AND WHOSE
PERSEVERANCE AND SUCCESS IN ACHIEVING OTHER IMPORTANT
LEGAL REFORMS,

HAVE EARNED FOR HIM THE WELL-MERITED GRATITUDE,
NOT ONLY OF THE PROFESSION OF WHICH HE IS HEAD,
BUT ALSO OF THE COUNTRY AT LARGE,

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AND FACILITATE THE LABOURS OF THE STUDENT
IN THAT DEPARTMENT OF JURISPRUDENCE OF WHICH HIS LORDSHIP
HAS SO LONG BEEN THE MOST DISTINGUISHED ORNAMENT,
IS, BY PERMISSION,
MOST RESPECTFULLY INSCRIBED,

BY

THE AUTHOR.

THE GREAT EAST INDIA COMPANY

IN THE COURT OF COMMONS

IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND SEVENTY TWO

THE FOLLOWING IS A TRUE AND CORRECT COPY

OF THE PETITION

PRESENTED TO THE HOUSE OF COMMONS

BY THE

MEMBERS OF THE GREAT EAST INDIA COMPANY

IN ANSWER TO A RESOLUTION PASSED IN THE HOUSE OF COMMONS

ON THE TWENTY-NINTH DAY OF JANUARY LAST

IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND SEVENTY TWO

AND OF THE REPLY THEREON

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PREFACE

TO THE FIRST AND FOLLOWING EDITIONS.



IN presenting the following pages to the public, the author conceives that no just offence can be taken for his having attempted to add one more stepping-stone to those already placed in the path of the inexperienced but inquiring student, for the purpose of facilitating his ascent to the more extensive and abstruse researches in that department of the profession which forms the consideration of this little work. The want, which is so frequently lamented in the commencement of this part of the Law Student's labours, of some epitomized publication, wherein the leading doctrines and practice of Equity are so concentrated as to give at one view the whole scope of the subject, often induces him to sketch out for himself a plan of every work of authority to which he may have recourse during the progress of his studies; but, as these books principally relate to one single branch or other of equity, without combining in them the entire system of equitable jurisprudence, they

appear, notwithstanding their great and intrinsic merit, too voluminous and mighty for the memory of a mere tyro, who is seeking to condense, by some analytical contrivance, the principles and practice of the court, before he enters at large upon the more profound and scientific study of his profession. The reason of the inadequacy of such works to meet the immediate exigencies of the student is obvious,—that they are written for the direction and information of the skilful and apt practitioner or learned advocate, rather than the uninstructed pupil; and thus the latter, without possessing any clear notions of even the rudiments of the subject, is at once brought into contact with all the niceties and subtle reasonings of the practised mind, addressing itself to minds equally matured.

The object of these few pages is, therefore, to give the student such a general survey or outline of the courts of equity, as to enable him so to acquaint himself with the subject, that he may not feel his energies damped when called upon to engage with the more abstruse and minute researches into their separate and distinct branches. Nothing can be more disheartening to the uninitiated in any science than to be confined to the dry task of becoming acquainted with one particular and isolated portion of it, previously to his being furnished with its general principles, and the relative bearing which one part has to another. It is surely time enough to obtain a knowledge of the various cities or towns of any particular country, after one has become acquainted with the four quarters of the globe, that

quarter in which the identical country is situated, and the position which the latter holds with respect to neighbouring nations. Every student feels anxious to possess a general sketch of his study, before he sits down to grapple with its parts in detail—to have, in fact, so comprehensive a notion of the whole matter, as to be able to answer any fair and general question relating thereto, whenever necessity or occasion may require. It is for such purpose that the author has presumed to address this little work to the rising members of the profession, in the anticipation that it will not only assist them in their inquiries prior to being admitted into fellowship with the acknowledged members of the law, but will also prove a kind of *vade mecum* whilst engaged in the active duties of their calling.

It must however be distinctly understood, that these suggestions are by no means intended to supersede all further inquiry into the subject of which they profess to treat,—the main object of the author being rather to facilitate and clear the way for more extensive examination; in other words, to afford the student such a knowledge of the equitable jurisdiction, as will induce him to follow out the points, many of which are but slightly hinted at, and thereby enable him, by an easier course, to arrive at a fair and creditable position among the numerous members of the legal profession.

And, since to the practised lawyer, or experienced solicitor, all works of an elementary character can offer but very few attractions, the following is therefore chiefly presented to those who are anxiously preparing them-

selves previous to their taking a part in the more onerous and responsible duties which they will ultimately be called upon to fulfil.

CHANCERY CHAMBERS,

QUALITY COURT,

December 3, 1861.

INTRODUCTION.

BEFORE directing the student's attention to that which is to form the subject of this present little work, it may be necessary to take a short survey of the principal officers of the High Court of Chancery, and their respective duties; and for this purpose we must first observe, as we shall hereafter more fully have occasion to explain, that the Court of Chancery consists of two jurisdictions; the one called the Ordinary, and the other the Extraordinary Jurisdiction. In the former (which is also denominated the Petty Bag side) the proceedings are conducted according to the common and statute law: in the latter they are regulated according to the rules and maxims of equity. Our inquiry will relate principally to the Equity side of the court, or, in other words, its Extraordinary Jurisdiction.

There were formerly but three judges belonging to the Court of Chancery, each however sitting to administer justice in his own proper court. The chief of these was the Lord Chancellor, next to him the Master of the Rolls, and lastly the Vice-Chancellor. But, by reason of the great arrear of suits in these courts, it was found expedient to add two other judges in chancery. This desirable object was effected towards the latter end of the year 1841, and accordingly two new Vice-Chancellors were appointed, and two separate courts erected, over which they severally preside.

The LORD CHANCELLOR* is the highest judicial officer in the realm, and is styled the Lord High Chancellor of Great Britain. He is invested with the office by delivery to him of the great seal by the sovereign, and by taking his oath. He is one of the Privy Council by his office, and prolocutor of the House of Lords by prescription. He takes precedence of all temporal peers, and is patron of the king's livings under a certain value. From his having the custody of the great seal, he is frequently called in the older reports the *Lord Keeper*; and, according to the testimony of an author who wrote in the reign of Henry II., when the archbishops were usually chancellors, the chancellor was the second person of the realm and next to the king: with one side of the king's seal, of which he had the custody, he had the power to sign his own injunctions and dispose and order the king's chapel as he pleased. He was to receive and keep all archbishoprics, abbeys, and baronies, void and falling into the king's hands; to be present at all coronations, and thither to repair uncalled; and that all things be directed and disposed of by the advice of the lord chancellor.^{a†}

* Mr. Justice Blackstone, who usually waxes warm at the bare mention of the Pope and the Roman Church, endeavours to show that we are indebted to the pride of the latter for our highest judicial functionary. He first derives the office and name of chancellor from the courts of the Roman emperors, where it signified a scribe or secretary, who became afterwards invested with certain judicial powers and superintendency over the rest of the officers of the prince, and then states, that from the Roman Empire it passed to the Roman Church, ever emulous of imperial state; and hence, every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities. Being formerly usually an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience (B. iii. 47).

^a Choice Cases in Chancery, Introd. 59.

† He was, as stated in the text, frequently called the lord keeper in former times, although it does not follow, as of course, that the Lord Chancellor and Lord Keeper should have been one and the same person,

His office is determinable at the monarch's pleasure, or the re-delivery of the great seal.

Although there may be traced but a slight degree of similarity between the office of chancellor as it existed in the early days of Saxon dynasty, and the importance which it assumed in after-times,—yet, when we also consider the at any rate during the history of the Court prior to the reign of Queen Elizabeth; for it was declared, by a statute passed in the fifth year of her reign, chap. 18, that the authority of the Lord Keeper and the Lord Chancellor of England should be but one. It has been said, however, that there was a marked distinction between them both before and after that statute; and that several instances have occurred of there having been a lord chancellor and a lord keeper of the great seal exercising their respective offices at the same time. *Vide* 'Kennedy's Code of Practice in Chancery,' p. 22 *n*.

Lord Ellesmere thinks the first sole keeper of the great seal to have been Simon the Norman, in the 23rd Henry III., of which however he was shortly after deprived, when he was banished the court for refusing to seal the patent whereby Thomas, Earl of Flanders, might demand fourpence for every sack of wool that went out of England into Flanders. He states, also, that sometimes the chancellor of England had a keeper of the seal subscribed to him. Thus there was Ranulph the Chancellor, and Richard the Chaplain, keepers of the great seal to Henry I., both at the same time. Sometimes there were two keepers of the great seal contemporaneously, as in the instance of Jeffrey le Templer and John de Lexington, notwithstanding Ralph Neville remained chancellor.

"Sometimes," adds his Lordship, "the great seal was delivered unto three at once, as by Edward II. to William Melton and two others joined with him, for a certain time to execute all such things as were to be done therewith during the king's pleasure.

"The election or creation of chancellors and keepers, etc., was of more than divers degrees and qualities. Sometimes, and for the most part, the chancellor was elected by the king, *durante bene placito*, and put into office by the delivery of the seal; and sometimes the chancellor was made by patent, to hold the place or office during his life, as Walter Gray, Bishop of Chester, in the time of King John, and others; some, and the most part, were elected by the king only; some had patents of the king, and were confirmed chancellors by consent of the three estates, as was Ralph Nevill, Bishop of Chester, in the time of Henry III."—*Observations on the Office of Chancellor*, pp. 14, 15.

moderate degree of dignity and power attached to the sovereigns at that period of our history,—we shall not discover a greater disproportion between the king and his chancellor, or bocara, or secretary, or by whatever name he was called, than between the sovereign and the chancellor in more modern times. Until the time of Edgar, a Saxon king was little better in degree than a superior among chieftains, and, at best, but the sovereign of a small territory; whilst the chancellor was generally an ecclesiastic, chosen from a body of men who, in the midst of a nation of unlettered warriors, were the sole depositories of all literature, both ancient and modern. Hence their services were essential in all transactions throughout the country, whenever a deed or any other formal document was to be drawn and executed; and, bearing in mind their acquaintance with the laws as well as the literature of ancient nations, especially the Roman civil and canon law, we can well conceive the influence which they exercised among our brave but illiterate ancestors. That this was the chief employment of the secular clergy, namely, the drawing of grants, gifts, conveyances, etc., in the common transactions arising among the laity, is obvious to any one who takes a retrospect of those times;^b and, even for some considerable period after the Conquest, the office of chancellor continued to be much of the same character and importance as before that era; namely, the making out of the royal precepts and charters, although, in subsequent times, he gradually rose to the highest degree of secular dignity. In the reign of William Rufus, the chancellor subscribed his name rather by virtue of his ecclesiastical order than on account of his office as such. He signed as chief among the royal chaplains, having the custody of the documents that were kept in the king's chapel, and also the care of the royal seal.*

^b Palgr. Rise, p. 204.

* “Chartam istam (Gulielmi Secundi) dignam esse, quæ hic locum

Lord Ellesmere, in his 'Observations on the Court of Chancery,' enters into a learned account of the office of chancellor, which he traces up to Jehoshaphat, the son of Ahilud, among the Hebrews.

The 60th section of the 15 & 16 Vict. c. 80, provides that the lord chancellor may, within six weeks after he has delivered up the great seal, give to the registrar of the Court of Chancery a written judgment signed by him in any case heard by him and standing for judgment, and thereupon a decree or order is to be drawn up.

Whenever a vacancy occurs in the chancellorship, the duties of that office are discharged by commissioners appointed by the crown, and the seal is then said to be in commission. The custody of the great seal is entrusted to the chief of the persons thus constituted by the crown, who are styled the "Lords Commissioners of the Great Seal."

LORDS JUSTICES.—By virtue of the 14 & 15 Vict. c. 83, two new judges of appeal were created, who together with the lord chancellor form the Court of Appeal in Chancery (sec. 1), and the jurisdiction possessed by the lord chancellor in the Court of Chancery at the time limited for the 14 & 15 Vict. c. 83, to come into operation, viz. 1st October, 1851, and all powers, authorities, and duties, as well ministerial as judicial, incident to such jurisdiction then performed by the lord chancellor and the statutory jurisdiction exercised by the lord chancellor acting judicially in the Court of Chancery, may be performed by the Court of Appeal (*ib.*, secs. 5 and 6). The jurisdiction possessed by the vice-chancellors in bankruptcy is to be exercised by the court of appeal (sec. 7). The power of the court of appeal may be

habeat existimo propter varias rationes :—Primo, quod tūm, more *Anglo-Saxonico*, cum crucis signis, tūm *Anglo-Normanico*, cum sigillo regis, corroboratur. Secundo, quod tot tempore æqualium virorum præsertim ecclesiasticorum qui magni nominis fuerunt, illustris videtur."—Hickes' *Disser.* 46.

exercised either by the lord chancellor alone or by one only of the lords justices and the lord chancellor, sitting together as such court of appeal, or by both the lords justices sitting as such court, apart from the lord chancellor (sec. 11).

These judges are styled "lords justices of appeal in chancery," and take rank and precedence next after the lord chief baron of the Exchequer, and as between themselves according to the order and time of their appointment (sec. 3).

The decisions of the majority of the judges of the court of appeal shall be taken and deemed to be the decision of the court; and if the judges of the court be equally divided in opinion on any cause or matter brought before the court by way of appeal, the decree or order appealed from shall be taken and deemed to be affirmed by the court of appeal (sec. 9).

The lord chancellor may authorize one of the lords justices to sit in lieu of the master of the rolls or one of the vice-chancellors in case of their illness or absence (sec. 14).

The present lords justices are Sir James Lewis Knight-Bruce and Sir George James Turner. These judges are by virtue of the Queen's sign-manual entrusted with the persons and estates of idiots, lunatics, and persons of unsound mind; and all the functions of the lord chancellor under the Queen's sign-manual, with respect to the persons and estates of the above class of individuals, may be exercised by the lords justices for the time being entrusted as aforesaid (sec. 15).

THE MASTER OF THE ROLLS is appointed by the crown by patent, and may hold his office for life. The exercise of his judicial authority is to be traced from the reign of Edward I.^c He exercises a distinct jurisdiction in a separate court called the Rolls. He ranks next after the lord chief justice of the Queen's Bench, and is thus the third judicial character in the state. His jurisdiction extends to the hear-

^c Spence, Eq. Juris. 358.

ing and determining originally all matters cognizable in the chancellor's court, except cases in lunacy and bankruptcy.^d The master of the rolls has the custody of the records of Chancery, and is chief clerk of the Petty Bag office.*

Formerly, everything that was presented to the master of the rolls for his decision (excepting the hearing of causes) was brought before him by petition. But now, by a recent statute,^e he is empowered to hear and determine all such motions, pleas, or demurrers, arising in or filed in causes depending in the High Court of Chancery, as shall be duly set down for hearing before him.

The decrees of the master of the rolls must be signed by the chancellor, previously to their being enrolled.

THE VICE-CHANCELLOR is appointed by the crown under letters patent. The office of vice-chancellor, as it now exists, is comparatively of modern date, having been created by the statute 53 Geo. III. c. 24, and is held during good behaviour. The title, however, as well also as the functions of vice-chancellor, is of considerable antiquity, and frequently mentioned by our earlier writers, and appears to have been known in the time of Henry II. and Richard I., and even at a more remote period of our history,† although

^d 3 Geo. II. c. 30.

* His title in the patent is *clericus parvæ bagæ, custos rotulorum, et custos domus conversorum*, so called, because the Jews, anciently, as they became converted to Christianity, were sent into that house apart from the rest of the Jewish nation in London. The same house, with its appurtenances, was appropriated by Edward III. to the preserving of the rolls-records of the Chancery. Hence it is denominated *The Rolls*.—Cambden, 428. Choice Cases in Chancery, Introd. 71.

^e 3 & 4 Will. IV. c. 94.

† “Although there may be perceived some small difference between a keeper of the great seal and a vice-chancellor; for of vice-chancellors also I find two sorts, the one exercising the office of a chancellor in matters of justice, and such an one was *Malus Catulus* in the time of King Richard I. Another was the chief secretary, as it seemed, unto

the office had for ages fallen into disuse. The duties of the vice-chancellor are to hear and determine all causes, matters, and things depending in the Court of Chancery, either as a court of law, or as a court of equity, or as incident to any ministerial office of the said court, or which have been, or shall be submitted to the jurisdiction of such court.* His office is ancillary to that of the chancellor; for he was, by the provisions of the above statute, to sit for his lordship in his absence, or whenever he was by him called upon to do so, or in a separate court, whether the chancellor were sitting or not. He ranked next in precedence to the master of the rolls. By 5 Vict. c. 5, s. 19, two additional vice-chancellors were appointed to assist in the discharge of the judicial functions of the lord chancellor. Their duties are similar to those given by the above mentioned Act, 53 Geo. III. to the vice-chancellor. There are therefore at present three vice-chancellors.

MASTERS IN ORDINARY IN CHANCERY consisted of twelve in number, at the head of whom was the master of the rolls;*

the chancellor, to write the patent of the prince; and such an one was *Sywardus*, whose name I have seen subscribed to a charter of Edward the Confessor: '*Ego Sywardus Notorius ad vicem Regis dignitatis Cancellarii subscripsi.*'"—Lord Ellesmere's Observ. 14, 15.

* But the vice-chancellor has no jurisdiction in matters of bankruptcy; for, by the 1 & 2 Will. IV. c. 56, s. 3, it is provided that all appeals from the Court of Review to the lord chancellor shall be heard by him only, and not by *any other judge* of the High Court of Chancery.

† 1. "Imprimis—quod sint duodecim magistri Cancellarie sicut olim Ordinarij."

2. "Item quod Custos Rotulorum sit unus et primus eorundem duodecim."—Sand. Ord. 7 b. temp. Hen. V.

But in the reigns of Edward VI. and Elizabeth there were only six masters, according to the authority of Sir Thomas Smith, who, speaking of them in his own time, says they were assistants in the court, "to show what is the equity of the *civil law* and what is *conscience*."—Commonw. of Engl. ed. 1663, 12mo.

but as their name and office only have become extinct whilst their judicial and ministerial functions must of necessity be continued and be performed through the medium of other channels, it may not be amiss to say a word or two respecting those officers who for so long a period had been associated with the Court of Chancery.

The duty of every master was to execute the orders of the Court of Chancery, upon references made to them by the court, acting either in exercise of its original jurisdiction, or under any Act of Parliament, or by the lord chancellor, in lunacies or bankruptcies,^f and by reports in writing, to certify in what manner they had executed such orders. Each master executed the orders of reference made without the interference of any other master.

The creation of the masters in chancery, for assisting the chancellor in some of the minor details of his duties, was of very ancient date. As will be stated hereafter, the common-law power of the chancellor comprehended, among other important functions, that of issuing all original writs. When, therefore, the gradual increase of the chancellor's duties rendered it necessary to engage some other persons to relieve him, or share in his responsibilities, a certain number of clerks, called *Præceptores*,* (*quod brevia, causis examinatis, remedialia fieri præcipiunt*), men of considerable importance both in Chancery and in the Parliament, were associated with him as *Collaterales et Socii*. They were afterwards^g called *Masters*, or *Clerici de primâ formâ*;^h and probably their number was twelve, as in the next reign they are

^f 5 & 6 Vict. c. 84, *infra*.

* These masters, as their ancient name *Clerici* imports, were generally, if not always, ecclesiastics or doctors of the civil law (Duck, p. 29), possessing, as an essential qualification, a sound knowledge of the laws of England.—Fleta, lib. ii. c. 13, p. 76.

^g Temp. Edward III.

^h Hargrave's L. Tr., Treatise of the Masters, 295.

expressed to be.ⁱ Their appointment was anciently, as now, by patent from the crown, although the patronage of such appointment belongs to the lord chancellor.* In former times they seemed to have established a kind of college among themselves, living together either in the king's house, or in some hostel especially assigned to them for that purpose, and were supported by church preferments out of the patronage of livings in the king's gift under the value of twenty marks, which were entrusted to the chancellor for that purpose.^j

This department of chancery, the *officina brevium*, was thus established; and the duties of the masters, as to the issuing of writs, were to hear and examine the complaints of such as sought redress in the king's court, and to furnish them with appropriate writs.^k

The matters which became the subject of reference to the masters were so numerous, as to render it impossible to detail them with any degree of accuracy, as they were as varied as the subjects which are made cognizable by the court; but the reader will find a general statement of those heads of reference in that part of the subject which treats of proceedings in the chief clerk's office.

The last few years have witnessed a greater revolution in the chancery proceedings and practice than has been seen for many previous ones. Not only has a sudden change been felt throughout the practical department of the courts of equity, but a most important branch of the jurisdiction,

ⁱ Ord. Cancell. 12 Richard II., Sand. Ord. p. 1.

* The eleven masters, as also the master of the rolls, were, in ancient times, appointed by the king; but, in the reign of Edward IV., the appointment of the eleven masters was committed to the chancellor, whilst that of the master of the rolls remained in the crown. Mr. Spence states that after an interval of nearly four hundred years, they were again appointed by patent from the crown.—360 *n.* (g).

^j Spence, 359 *n.* and 360.

^k Fleta, lib. ii. c. 13, p. 77. Spence, 238.

the masters' offices in chancery, which for centuries formed part and parcel of the system, has, by an Act of Parliament, been suddenly lopped off, and its powers and functions become merged in that of the judges themselves. The yawning chasm which for ages had contrived to swallow up the hopes as well as the estates of the current generation of suitors has at length been finally closed; whilst, by another potent act of the Legislature, the almost interminable longevity of a chancery suit, like the post-diluvian race of men, is doomed to have its days considerably shortened, so that henceforth one may calculate within a few months when a suit, once commenced, is likely to be brought to an end. A youthful lawyer may now expect to see the origin, progress, and termination of a succession of chancery suits during his mortal life, that shall in number equal the reigns which the venerable Jenkins is said to have witnessed. The two Acts of Parliament, 15 & 16 Vict. c. 80, and 15 & 16 Vict. c. 86, which have accomplished these important changes, will long retain a prominent position in the public mind, as well as in the memory of the legal practitioner.

For a considerable period, however, it may not be amiss to preserve a knowledge of the old practice, for until the ancient suits shall have become extinct through age, or their natural existence abridged by consent of the opponent parties, it will be necessary to understand something of their past history, such as the filing of the bill written on parchment; summoning the defendant by means of a subpoena to appear to and answer the bill; the defendant taking an office copy of the bill, sometimes of appalling magnitude; his answer; the interrogatories, viz. confessing and avoiding, traversing and denying, all the allegations in the bill which he might be required to answer; the six weeks for that purpose after appearance and answer; another six weeks before the answer was deemed to be sufficient from effluxion of time; the replication; the commission to examine witnesses after issue joined;

passing publication ; decree ; reference to the master in rotation ; a due acquaintance with those mystical things called warrants, by which the masters' business was conducted, who, after travailling for somewhat less than a whole generation in the retirement of their respective offices, produced at length, as the result of their labour, a huge mass of paper called the master's report, followed by a decree upon further directions ; and lastly, as its name imports, the final decree.

Before entering upon the consideration of these two important Acts, to which reference has just been made, it will be necessary to mention Sir George Turner's Act, the 13 & 14 Vict. c. 35 ; for, although the 50th and 51st sections of the 15 & 16 Vict. c. 86, will in some degree supersede the provisions of that Act in regard to expense, yet, where the parties can all agree, they must proceed as therein pointed out. It is intituled, "An Act to diminish the Duty and Expense of Proceedings in the High Court of Chancery," and provides in section 1, "That it shall be lawful for persons interested, or claiming to be interested, in any question cognizable in the said court as to the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter, or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold, or otherwise dealt with, or as to the parties to, or the form of, any deed or instrument for carrying any such contract into effect, or as to any other matter falling within the original jurisdiction of the said court as a court of equity, or made subject to the jurisdiction or authority of the said court by any statute not being one of the statutes relating to bankrupts, and including, among such persons, all lunatics, married women, and infants, in the manner and under the instructions hereinafter contained, to concur in stating such question in the form of a special case for the opinion of the said court ; and it shall also be lawful for all executors, administrators, and trustees to concur in such case."

The first six sections of the Act point out the mode in which persons not *sui juris*, or those under disability, may, through the medium of those placed over them, concur in such case (*vide* 23 & 24 Vict. c. 38, s. 14, under "special cases," *infra*, p. 490).

The main question which arises under the Act is, whether the parties can all agree upon the facts necessary to form a case for the opinion of the court? If the parties can so agree, then the Act, throughout the first eighteen sections, is intended to prevent the inconvenience so peculiar to the Court of Chancery, in respect to a declaratory decree, involving, as it would, all the expense and delay of a regular chancery suit, which professed to do justice and administer complete relief to all parties. Considerable care is taken in respect to idiots, and other persons under disability, as to such agreement, in order to render the Act available. But it is to be observed, by referring to the 19th section of the Act, that its provisions extend to applications by executors or administrators in reference to personal estates only, and cannot be used until a year after the decease of the testator or intestate. But by the 45th and 47th sections of the 15 & 16 Vict. c. 86, an additional remedy is provided by making the benefit to extend to both real and personal estates; and parties are not now obliged to wait till the expiration of a year from the death of the deceased: nor does the latter Act confine its provisions to executors or administrators only, but allows creditors, and other persons interested under the will, or as next of kin, to apply to a judge for administration of the estate of the deceased.

The masters in chancery then have ceased—their legal existences having been put an end to by the 15 & 16 Vict. c. 80. This Act professes to be one "to Abolish the Office of Masters in Ordinary of the High Court of Chancery, and to make Provisions for the more speedy and efficient dispatch of business in the said Court."

The above Act was passed upon the recommendation contained in the Report of the Chancery Commissioners. Their first Report bears date January 27th, 1852; and it was upon this Report that the respective Acts 15 & 16 Vict. c. 80, and the 15 & 16 Vict. c. 86, were founded. The object of both these Acts was, as above expressed, to carry out the purposes of justice with the least possible delay and expense to the suitor. And it was justly conceived by the learned commissioners, that the course of procedure adopted in the masters' office was just the very means for not producing so desirable a result; for, according to their statement, "the system, obviously calculated to cause unnecessary delay and expense, had its origin at a time when the masters and their clerks were paid by fees."

The first few sections of the Act relate simply to the abolition of the masters' office, their release from their duties, their salaries and compensation, and the winding-up matters and causes then before them, and also the duties of the remaining masters (*vide* secs. 1-10 inclusive).

The powers of the judges sitting in chambers to perform the duties formerly transacted by the masters are pointed out in sections 11 and 12, which provide that from and after the first day of Michaelmas Term, 1852, it shall be lawful for the master of the rolls, and the vice-chancellors for the time being, and they are thereby required, in conjunction with their respective courts' business, to sit at chambers, in proper rooms attached to the courts, for the dispatch of such part of the business of the court as can be carried on without any detriment to the public arising from the discussion of questions in open court, according to the directions therein contained, and at the times during which they shall respectively so sit.

By section 13, these judges, when sitting in chambers, shall have the same power and jurisdiction, in respect to the business brought before them, as if they were sitting in open

court; and the orders made by them in their respective chambers are to be drawn up by their respective clerks, or by the registrar of the court, in the same manner as an order made in open court is now drawn up; and each one of the judges at chambers may require the attendance of the registrar of the court to be in attendance at chambers (sec. 14).

Section 15, which ought to be read in connection with section 13, is deserving of notice, as it places the jurisdiction exercised by a judge sitting at chambers upon an equal footing with orders of the Court of Chancery, and as such may be signed and enrolled in like manner; and notwithstanding no actual provision is made for entering such chamber orders, it is presumed that such a proceeding will be equally necessary.

For the purpose of assisting in the general business of each court, the master of the rolls, and each of the vice-chancellors, with the approbation of the lord chancellor, are empowered to appoint two chief clerks, each to be respectively attached to each such judge and his successors in office (sec. 16). These chief clerks are required to have been either chief clerks to the masters in ordinary, or solicitors, or attorneys, of ten years' practice (sec. 17); and to each of these chief clerks the judge of each court may appoint a junior clerk (sec. 18).

The lord chancellor may remove any person accepting office under this Act who shall be found engaging in any employment, or receiving any sum of money or benefit other than his salary, or what he is allowed to take under any Act of Parliament or order of the court or of the lord chancellor; or if such person, being or having been a solicitor or attorney, shall directly or indirectly receive or secure to himself any continuing benefit from any business or firm in which he may have been engaged previously to his appointment to such office, the person so offending may be removed by the lord chancel-

lor, and shall be rendered incapable of afterwards holding any office, situation, or employment in the court (sec. 19); and every solicitor or attorney appointed to any office under the Act must forthwith cause himself to be struck off the rolls (sec. 20). Every chief clerk is to hold his office during his good behaviour (sec. 21), subject to his being removed by the lord chancellor as stated in sec. 25; and every junior clerk shall hold his office at the pleasure of the judge to whose court he may be attached (sec. 22): and both the chief and junior clerks are to be under the *control* and *direction* of the judge to whose court they shall be respectively attached, and shall attend at such places, during such times, and for such hours in each day, and perform such duties, as such judge shall from time to time direct (sec. 23). And they are to be subject to the same prohibitions, prosecutions, penalties, and punishments as are imposed by the 3 & 4 Will. IV. c. 94, as respects officers of the Court of Chancery (sec. 24); and the lord chancellor may, with the concurrence of the master of the rolls and vice-chancellors, or any two of them, without assigning any cause, by any order, remove any chief clerk to be appointed under the Act (sec. 25).

The next part of the Act relates to the business to be transacted by the judges sitting in chambers; and it is provided, by section 26, that such business shall consist of such of the matters therein pointed out as the judge shall from time to time think may be more conveniently disposed of in chambers than in open court.

COMMISSIONERS TO ADMINISTER OATHS.—These officers exercise the powers and perform the duties which formerly belonged to the office of *masters extraordinary in chancery*. The duties of these latter functionaries consisted in taking affidavits appertaining to any matter depending in or relating to the Court of Chancery; to take the acknowledgment of deeds to be enrolled in the said court, and to take

such recognizances as might by the tenor of the order for entering into them be taken before a master extraordinary.

THE ACCOUNTANT-GENERAL.—This officer was first appointed by the statute 12 Geo. I. c. 32, and stands in the situation of the master and usher of the court. This statute, among other things, directed that there should be one person appointed by the Court of Chancery, to perform all such matters relating to the delivery of the suitor's money and effects into the bank, and taking them out of the bank, and the keeping the accounts with the bank, and all other matters relating thereto, as were done by the master and usher; such officer to be called the accountant-general of the Court of Chancery, and to hold office during the pleasure of the court.

The Governor and Company of the Bank of England have the general custody of the effects belonging to the suitors of the Court of Chancery, as the bankers of the court, subject to the orders of the court. These effects consist of cash, stock, exchequer bills, Indian bonds, shares in public companies, and specific articles deposited. All these effects are placed in the bank in the name of the Accountant-General; but he does not receive any of the suitor's money or effects into his own custody, but his duty is to keep an account with the bank according to the several causes. The dividends and interest of the several stocks, Indian bonds, and other securities, are received by the bank as they become due under a power of attorney from the accountant-general, and placed to the credit of the causes and accounts to which they respectively belong.

Here the student will be reminded of the new orders in chancery, which came into operation from the 1st February, 1861, relating to the investment of cash under the control of the court, and is made in pursuance of stat. 23 & 24 Vict. c. 38, s. 10. By section 11, and also by virtue of the above-mentioned orders, trustees, executors, or administrators

having power to invest their trust-money upon government or real security, stocks, funds, and securities, may now, under the control of the court, invest them in Bank stock, exchequer bills, and £2. 10s. per cent. Annuities, and upon mortgage of freehold and copyhold estates in England and Wales, as well as in Consolidated £3 per cent. Annuities, Reduced £3 per cent. Annuities, and New £3 per cent. Annuities (Ord. 1).

For each sum of money to be received by the bank the accountant-general signs a certificate, mentioning the order, report, or Act of Parliament, under the authority of which the person named in the certificate is to pay the sum therein specified, and directing it to be placed to his account, as accountant-general, to the credit of the particular cause or account mentioned. When the party paying in the money, or his solicitor, brings into the accountant-general's office a certificate from the bank of such payment having been made, the accountant-general signs another certificate of such payment, and annexes it to the bank certificate, for the purpose of being entered in the report office.

REGISTRARS.—The duties of these officers are to attend in court, as the lord-chancellor, with the concurrence of the master of the rolls and the vice-chancellors, or any two of them, from time to time by any general order may direct (5 Vict. c. 5, s. 39). They draw up minutes, decrees, and orders, and make copies thereof, mark exhibits proved in court *vivâ voce*, and sign certificates; enter for hearing pleas, demurrers, causes, appeals, re-hearings, further directions, further considerations, exceptions, appeal motions and motions for decree, and make out a book of the same; deliver notes for subpoenas to hear judgment, make out a paper of causes and other matters to be heard in court, and receive deposits upon filing exceptions and bills of review, and also upon setting down petitions for re-hearing and of appeal. The deposits on setting down appeals and exceptions for hearing

are, once in every three months, to be paid into the bank by the senior registrar to the credit of the accountant-general, and placed to the "Appeal Deposit Account" (15 & 16 Vict. c. 87, s. 41). The number of registrars was, by 5 Vict. c. 5, s. 38, increased to ten, and, by s. 40, the number of their clerks to twelve. By 14 & 15 Vict. c. 83, s. 21, the lord chancellor is empowered to appoint an additional registrar (see Smith's Ch. Pr. ed. 6, p. 21).

By the 18 & 19 Vict. c. 134, the report office was abolished. The business of that office, with the exception of such part of it as was transacted by the entering clerks, is now conducted under the superintendence of the clerks of the records and writs, who perform all the duties relating to the report office belonging to the office of master of reports and entries. The part of the business transacted by the entering clerks is carried on by them under the control of the senior registrar for the time being. They are called the entering clerks to the registrars (secs. 5 and 6).

By the 3 & 4 Will. IV. c. 94, the office of master of reports and entries, two clerks, to be called clerks of entries, and ten clerks of accounts, were appointed.* The duties formerly transacted by the master of the report office by the entering registrars or entering clerks, or by the clerk of the exceptions, so far as found necessary, were performed by the master of reports and entries in the manner mentioned by the above Act. By the 30th Gen. Ord., 21st Dec. 1833, made in pursuance of that Act, the duties of these officers were regulated (Smith's Ch. Pr. p. 25).

EXAMINERS.—Their duties formerly were to receive all interrogatories for the examination and cross-examination of witnesses in any cause in the Court of Chancery; to examine and cross-examine such witnesses; to prepare the depositions of such witnesses in writing; to read over such depositions to the witnesses previously to their signing the

* See 15 & 16 Vict. c. 87, s. 27.

same; to certify in writing the different documents deposed to by the witnesses on their examination; to sign notices for the attendance of witnesses to be served with subpoenas; to grant certificates that interrogatories were or were not filed, and that witnesses had or had not attended for examination, and such other certificates as occasion may require.* But since the passing of the 15 & 16 Vict. c. 86, after providing for the oral examination of witnesses in certain cases, and reciting in sec. 65 that the public examination of witnesses orally under the provision of the Act would materially alter the nature of the duties and increase the responsibilities of the examiners, it empowers the lord chancellor to increase the salaries of the respective examiners as therein mentioned.

As to the nature of their increased duties, the object of the above Act being to assimilate the examination in Chancery as much as possible to the method pursued in the courts of common law, it will be seen, by referring to the 31st and 32nd sections of the Act, that witnesses are to be examined orally before one of the examiners in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined shall be subject to cross-examination and re-examination, which shall be conducted as nearly as may be in the mode now in use at common law where the witness is about to go abroad and not expected to be present at the trial (sec. 31). The depositions taken upon any such oral examination shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when complete shall be read over to the witness and signed by him in the presence of the parties, or such of them, as may think fit to attend; but the examiner may, in his discretion, put down any particular question or answer if there shall appear any special reason for so doing; and which may be objected to is to be noticed

* Rep. p. 42.

or referred to by the examiner in or upon the depositions, and he is to state his opinion thereon to the counsel, solicitors, or parties, and to refer to such statement on the face of the depositions. The examiner has not power to decide upon the materiality or relevancy of any question (sec. 32).

When the examination is concluded, the original depositions, authenticated by the signature of the examiner, are transmitted by him to the record office of the Court of Chancery, to be there filed, and any party to the suit may have a copy thereof, or of any part thereof, upon payment for the same in such manner as shall be provided by any general order of the lord chancellor in that behalf (sec. 34).

Instead of suing out a commission for the examination of a country witness as heretofore, a *special examiner* appointed by order of the court has the like power of administering oaths as commissioners formerly had under commissions issued by the court for the examination of witnesses (sec. 35).

The office of SIX CLERKS is now abolished; but, whilst they enjoyed an existence, their duties were to receive and file all bills, answers, replications, and other records in all causes on the equity side of the Court of Chancery, and to enter memoranda of them in books, from which they were to certify to the court, as occasion might require, the state of the proceedings in causes. They signed all copies of pleadings made by the sworn clerks and waiting clerks, after seeing that the originals had been regularly filed: after every term they presented, to be set down, the causes ready for hearing in the ensuing term, either before the lord chancellor or the master of the rolls. They examined and signed dockets of decrees and dismissions prepared for enrolment, and saw that the records and orders were duly filed and entered, which they certified previously to the presentation of dockets to the lord chancellor, the master of the rolls, or the vice-chancellor, for signature.

To the six clerks were entrusted all the records in their

office, which remained in their studies for the space of six terms, for the sworn clerks and waiting clerks to resort to without fee.ⁿ

In pursuance of the 5 and 6 Vict., c. 143, abolishing the six clerks' office, it was ordered—

1. That all acknowledgments, affidavits, or affirmations, required for the purpose of enrolling any deed or other document in chancery, may be sworn or affirmed before the *Clerk of Enrolments* in chancery, or before any *Clerk of Records and Writs*, as occasion may require, for the better dispatch of business.

2. That the CLERK OF ENROLMENTS in chancery shall take and receive all such fees and sums of money as have, heretofore, been lawfully received by the clerks of enrolments and their deputies, or by the six clerks or any of them, as comptrollers of the Hanaper, or as Riding Clerk; and shall pay all such fees and sums of money into the Bank of England, in the name of the accountant-general, to be placed to the credit of the account, intituled "The Suitor's Fee Fund Account."

3. That the CLERKS OF RECORDS AND WRITS shall perform all such duties as have heretofore been performed by the six clerks, sworn clerks, or waiting clerks, as officers of the court, in relation to the several matters hereinafter mentioned; that is to say, the filing, copying, and amending of all informations, bills, demurrers, pleas, answers, and other pleadings and records;* the entering of appearances, rules, consents, notes, and memoranda of service; the certifying of appearances and proceedings; the custody of extracts, de-

ⁿ Rep. p. 45.

* The fees formerly paid by a defendant to the six clerks, upon taking an office copy of a bill in chancery, are still payable to the clerks of records and writs; and they may refuse to file an answer to a bill, an office copy of which has not been taken by the defendant.—*Aked v. Aked*, 7 Jurist, 75.

posited for inspection and copying ; the attendance with records and extracts on the judges of the court, on the masters-in-ordinary, and at assizes, or elsewhere ; the enrolment of decrees and orders ; and all other duties heretofore performed by the six clerks, sworn clerks, or waiting clerks, as officers of the court in relation to suits and matters in equity, and not as attorneys, solicitors, or agents of the parties in suits or matters in equity.

Provision was also made to appoint officers for the separate business of taxation ; for by the 9th Order, Oct. 1842, it is declared that the TAXING MASTERS shall perform all such duties as have heretofore been referred to or performed by the masters-in-ordinary in relation to the taxation of costs, and shall, in respect thereof, have all such powers and authorities as are now vested in the masters-in-ordinary,—

To administer oaths ;

To examine witnesses and parties ;

To order the production and inspection of books, papers, and documents ;

To proceed *de die in diem* ;

To make separate reports and certificates ;

To require that any party be represented by a separate solicitor ;

And to direct and adopt all such other proceedings as may now be directed and adopted by the master-in-ordinary, on references for the taxation of costs, and taking accounts of what is due in respect of such costs and such other accounts connected therewith, as may be directed by the court.

That the SOLICITORS of the court, in all cases where the parties sue or defend by solicitors, and the parties themselves, in all cases where they sue or defend in person, shall perform all such duties as have heretofore been performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in relation to the several matters therein mentioned.

MASTERS IN LUNACY.—The office of clerk of the custody of lunatics and idiots was made to cease under the 5 & 6 Vict. c. 84, and the Ord. 27th Oct., 1842, and that all inquiries and matters connected with the persons and estates of lunatics theretofore usually referred to the masters-in-ordinary (except under the 11 Geo. IV. and 1 Will. IV. c. 60, as to estates vested in lunatic trustees, etc., and except where the lord chancellor should otherwise specially direct) to be thenceforth referred to the commissioners in lunacy for the time being.

But it was found necessary to expedite and simplify proceedings in lunacy, and to diminish the expenses usually attendant on such proceedings, and therefore an Act of Parliament was passed (16 & 17 Vict. c. 70, 1853), intituled "The Lunacy Regulation Act." This legislative enactment and the general orders of October, 1853, have made considerable alterations in the practice of the court on matters of lunacy. By the 39th section it is enacted, "That in lieu of the commission now issued specially in such case of alleged lunacy, a general commission to the like effect, with such variations as may be necessary or expedient, may from time to time be issued in duplicate under the Great Seal directed to the masters in lunacy by name jointly and severally, who shall, by virtue thereof, proceed in each case of alleged lunacy concerning which the lord chancellor shall order them to inquire in like manner, and with all the like powers and authorities (subject to the provisions therein contained), as if a commission had issued specially in such case, and every inquisition found and returned thereon shall be as valid and effectual to all intents and purposes as if the same had been found and returned on a separate commission."

The object of the Act and the general orders is to empower the masters in lunacy without the special order of the lord chancellor to enter upon the necessary inquiries and to re-

ceive any proposal relating either to the management of the person or the property of the lunatic.

In making the application to the master, a state of facts and proposal must be submitted to him, stating shortly what the parties propose to do and the mode of effecting it, together with evidence as to its propriety.

Of the alterations affecting the proceedings, both for inquiring into the state of mind of the alleged lunatic and for providing afterwards for the due care and management of his person and estate, the following are enumerated by Mr. Elmer.^o

“A general commission has been assigned to the masters in lunacy in lieu of the special commission formerly issued in each case.

“Juries are dispensed with unless in particular cases, if it be found important to call them.

“The inquiry as to the state of mind is, except under special circumstances, not carried back, but limited to the present time.

“All matters affecting the person and property of the lunatic may, after the inquisition, be presented before the masters without any special order of the lord chancellor for the purpose.

“The master's reports in all ordinary cases contain the directions consequential upon them, and are submitted to the lord chancellor for confirmation without petition. The fiat of his lordship thereon giving to them the operation of orders.

“The grant of custody, which was so expensive, is abolished, and the committee's security is settled by the masters without the expense of referring it to the attorney-general.

“Enlarged powers for the management of the estate are conferred upon the lord chancellor and the masters.

“And the provisions for ensuring, through the visitors

^o Prac. in Lunacy, Edit. 1857.

and the masters, the proper care and treatment of the lunatic are made more comprehensive." (Preface.)

CONVEYANCING COUNSEL.—It is now provided, that any of the judges sitting at chambers may receive and act upon the opinion of conveyancing counsel, with regard to such matters wherein the masters have hitherto been in the habit of requiring such opinion, with liberty for any party to object to such opinion, when he shall deem it open to objection; and therefore the point in dispute shall be disposed of by the court, or by the judge sitting in chambers.—15 & 16 Vict. c. 80, s. 40–41.

ASSISTANCE OF SCIENTIFIC PERSONS.—Any judge may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to assist him in any matter at issue, in any cause or proceeding, and to act upon their certificate.—*Ibid.* s. 42.

CLERKS TO THE JUDGES.—For the purpose of assisting in the general business of each court, the master of the rolls and each of the vice-chancellors, with the approbation of the lord chancellor, are empowered to appoint two chief clerks, each to be respectively attached to each such judge and his successors in office. Their functions and qualifications, together with the junior clerks, are pointed out by the same last mentioned Act, ss. 14, 16, 17, 18, 20, & 23.

Besides these various officers of the court, whose duties are more important, there are others of an inferior and subordinate character, which it is not necessary to enumerate here.

NEW ORDERS.—It may not be improper to mention in this place that, in the month of April, 1828, a new set of orders, consisting of eighty-one in number, were issued, under the sanction and direction of the lord chancellor, the master of the rolls, and the vice-chancellor, for the better regulating the conduct of suits.

In November, 1831, it was directed that these orders

should be amended, as to Numbers 6, 13, 16, 17, 18, 19, 24, 76, and 82, in manner as therein directed.

But, as it was found expedient that certain further orders for regulating the practice of the Court of Chancery should be added to those which were published in November then last, and that thereupon certain alterations should be made in the said orders, and that it was also expedient that the whole of the said new orders should be embodied together, under the Act of 3 & 4 Will. IV. c. 94, intituled, "an Act for the regulation of the proceedings and practice of certain offices of the High Court of Chancery," it was declared and directed by the lord high chancellor, with the concurrence of the master of the rolls and vice-chancellor, that from and after the 10th of January, 1834, the orders therein mentioned, from Nos. 1 to 36, both inclusive, should be considered as substituted for those of 26th November then last. All these, with the more recent ones, which bear date the 26th of August, 1841, and 11th of April, 1842, together with the new orders of 8th May, 1845, and all the subsequent orders were referred to, according to their respective dates,* until they became merged in the Consolidated Orders of 1860; but as many of them will continue to govern the practice of the courts, though not cited according to their dates as formerly, but as "the 7th & 8th Consolidated Orders," as the case may be; yet where any of these consolidated orders are identical with, or are only a mere repetition of the former, we shall continue to refer to them, both as to their date, and also under their new appellation.

The Consolidation Orders are distinguished by being

* The first five of the orders of 26th August, 1841, not being much relished by the profession, never came into operation. They were, therefore, by an order of 19th November following, suspended until Easter Term, 1842. The 4th order of 11th April, 1842, provided that they should not take effect until further order; and they are now, by the orders of 26th October, 1842, rendered wholly useless.

numbered with Roman capitals, and are divided into rules, and these rules are sometimes subdivided into articles. The rule is known by an Arabic numeral simply, whilst the article is enclosed in a parenthesis, and answers to the articles under the 16th Order, 8th of May, 1845.

Any rule of the Consolidated Orders is generally cited thus in court, "The 10th of the Consolidated Orders, Rule 11th," or in a book with greater brevity thus, "10th Cons. Ord. r. 11."

In referring to the published book of Consolidated Orders, the student will find an asterisk prefixed to the rules in which the practice is changed.

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PART I.

BRIEF HISTORICAL OUTLINE OF THE COURT OF CHANCERY.

CHAPTER I.

IN a rude and half-civilized age, when as yet commercial successes had not brought amongst us their invariable attendants, luxury and refinement, the few leading principles which regulated our courts of justice were found sufficient for all ordinary transactions then claiming their cognizance; but when trade, commerce, and other similar pursuits had introduced a system of life becoming every day more and more complicated and ramified, calling for a multitude of remedies proportioned to the increase of rights and their consequential injuries, these courts of justice were found inadequate for the purpose, and it was soon discovered that there existed rights to which they offered no protection, and injuries which they could not redress.^a Thus it has been found in the history of most

Rise and
progress of
our juris-
prudence.

^a Coop. 27.

CHAP. I. countries, that, although the object of legislators in framing their laws has been as much to establish a system which could equally provide for the growing as the then existing wants of a community, yet no positive enactments, however deliberately and maturely considered, were able to provide for the exigencies daily arising amongst an increasingly populous and enterprising people. The progressive improvement of our system of jurisprudence may be compared to the fabric of English liberty as described by Mr. Hallam, which "rose step by step, through much toil, and many sacrifices; each generation adding some new security to the work, and trusting that posterity would perfect the labour, as well as enjoy the reward."^b Thus it is that systems in accordance with the principles of natural and universal justice, have sprung up, supplying the deficiencies, guiding and assisting the administration of positive law, and offering redress where, from its nature, it could give none; and this deciding upon principles of natural justice is defined to be "judging according to equity."^c Such a tribunal as a court of equity, being so admirably adapted for the purpose of granting complete justice, exists, under some modifications, in almost every civilized country in the world.

Purpose of
courts of
equity.
Difference
between the
equitable
tribunal in
other
countries
and that of
our own.

It was well observed by Lord Chancellor Cottenham, in referring to the jurisdiction of our equitable tribunal, that it was the duty of the court to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is

^b Midd. Ages, iii. 217.

^c Mitf. Pl.

no other remedy.^d “It is therefore impossible,” said that learned judge in another case,^e “with precision to lay down rules or establish definitions as to the cases in which it may be proper for this court to exercise the jurisdiction. The infinitely varied transactions of mankind, would be found continually to baffle such rules and to escape from such definitions. It is therefore necessary for this court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties.” In Rome the equitable jurisdiction was eminently conspicuous in the office of prætor, who was called upon to determine according to the written or positive law, and give judgment according to equity and conscience, where a rigid adherence to the strict letter of the law would work a hardship or injustice.^f But the chief distinction between the prætor’s tribunal and the one now termed the Extraordinary Court of Equity is this,—that at Rome there was no separation of the legal from the equitable jurisdiction, inasmuch as the same judge pronounced the law or equitable sentence from the same tribunal. The Court of Session in Scotland is a court of equity as well as a court of law;^g in England the courts for the administration of law and equity are perfectly distinct; and in this instance, it would seem, we differ from every other country whatever.^h

In giving a slight historical sketch of the rise and progress of our courts of equity, it may be proper in the first place to observe, that among the Romans it was the custom of the prætor, when he entered upon his duties, to propound a set of rules, or course of procedure, by which he professed to regulate his decisions during his

Equity as
adminis-
tered at
Rome.

^d Taylor v. Salmon, 4 My. & Cr. 141.

^e N. E. Ry. Co. v. Martin, 2 Phil. 762.

^f Dig. 28. 3. 12.

^g 2 My. & Cr. 732.

^h Bl. b. 3. 50.

CHAP. I. yearly office. These rules were enrolled in the *album prætoris*, which served as a protection to the public against any abuse of office. This power of administering the rules of equity was afterwards assumed by the emperors exclusively. This will appear, by referring to the code of the Emperor Constantine, "*De interpretatione inter æquitatem et jus*," when he declares "nobis solis et oportet et licet inspicere,"ⁱ and further, in the same code, "Leges sacratissimæ quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi præscripto earum manifestiùs cognito, vel inhibita declinent, vel permissa sectentur. Si quid verò in iisdem legibus latum fortassis obscuriùs fuerit, oportet id (ab) imperatoria interpretatione patefieri, duritiamque legum nostræ humanitati incongruam emendari."—*Imp. Valentin.*^j

Duties of
the Roman
prætors.

The prætors appear to have exercised both a legislative and also a judicative power. The *edicta magistratum* consisted of the edicts of the prætors and of the ædiles, and composed that part of the Roman system known as the *jus honorarium*. The prætor, as before noticed, published a set of rules, or formulæ, upon entering into office, by which he professed to regulate his judicial conduct for the ensuing year, and, by enrolling these rules in the *album prætoris*, gave a guarantee of what should be his system of procedure during his continuance in office: this it seems was required for the purpose of counteracting the rigour of the laws of the Twelve Tables, at a time when they had scarcely been established as a regular system of jurisprudence. The prætors were therefore required to modify and supply the mischievous effects of the written code, in accordance with the claims of natural justice and equity,^k in those cases where a strict observance of its rules would produce too great severity and injustice.

ⁱ Cod. i. 14. 1.

^j Ibid. tit. xiv. 9.

^k Dig. L. 23. 3. 8.

The Emperor Hadrian published his celebrated code of equitable jurisprudence, or *Edictum perpetuum Hadriani*; which he compiled from the edicts of former prætors, and digested in fifty books: as it constituted the most important part of the *lex scripta*, it was followed by Justinian, when he compiled his Decretals, and also by the canonists and distinguished lawyers afterwards.¹ This compilation was intended to regulate the conduct of all subsequent prætors, by affording them one uniform system of equity; and, although this code was not in itself so complete as to furnish an ample remedy in every case which subsequently called for the interposition of the prætorian judges, it did, nevertheless, constitute such a *fons justitiæ*, as to infuse into the system of Roman jurisprudence copious supplies of equitable principles, even when the appellative jurisdiction from the severe maxims of law, had become exclusively vested in the emperors. The same may be said of our common law; which, after the courts of chancery had once become established in this country, adopted many of the principles and maxims into its own system. Indeed, in contemplating the numerous calls for equitable interference in all cases of contract, such as the *emptio venditio*, *locatio conductio*, *pignus*, *commodatum*, etc., which formed so refined and important a department of the Roman law, wherein mistakes, mis-statements—not to say fraud and circumvention—were constantly arising, under circumstances which rendered it impossible to be anticipated by any written system of positive law, we cannot but admit that recourse must necessarily have been had to some extraordinary jurisdiction, for the purpose of enforcing that *bonam fidem quæ æquitatem summam desiderat*.^m

During the Anglo-Saxon times, there seems to have

Among
the Anglo-

¹ D. 1. 6. 2; C. 1. 17. 1. 5; C. 4. 5. 8.

^m D. 16. 3. 31; 19. 2. 24; 19. 1. 50.

CHAP. I.
Emperor
Hadrian's
perpetual
edict.

CHAP. I.

Saxons,
appeals in
matters of
equity lay to
the king
only.

existed some vague notion of a course of proceeding distinct from the common rules of judicature; and this mode of procedure, so like that which regulated the civil law practice under the prætors, was doubtless upheld by the ecclesiastics, who, on account of their learning, were appointed to sit with the earl in his county court, and who were at all times anxious to introduce the maxims and principles of the Roman law, whenever an opportunity presented itself. It was, however, only to the king, as the source of justice, that an appeal could be made, whenever it became necessary to put into exercise the principles of equity, for the purpose of mitigating the rigour of the established law.ⁿ This appeal was not unknown among foreign nations where the civil law was recognized;^o but the privilege of granting relief by the sovereign, as a matter of royal clemency, was, in after-times, entrusted by him to his chancellor, or to the keeper of the privy seal, who was thereby to determine the subject of complaint according to the rules of equity and good conscience.

Improvements in the law during the reign of Edward I.

It is generally agreed that the reign of Edward I. witnessed a greater advancement in the science of law-making, and matters of general jurisprudence, than any other period of our history previously. It was now that masters in chancery, by virtue of the st. 13 Ed. I., called the Statute of Westminster the Second, were directed to prepare and issue writs in due form in ease of the chancellor. Their duties were, in reference to this department, to hear and examine the complaints of those who sought redress in the king's court, and to furnish them with appropriate writs; thus they were required to decide, not only what should be the proper form of the

ⁿ Wilk. Leg. Ang.-Sax. ; Leg. Polit. sec. 2.

^o Marculfi Monarc. form, lib. i. c. 28; Leg. Longob. lex 2, t. 45; Lindenb.

writ, but whether or no the applicant had really any remedy at common law.^P These proceedings afforded a great relief to the suitor, as it abated the rigour which the common law judges showed, in requiring that the forms in the register should be strictly adhered to. It required, however, a considerable lapse of time before a system of equitable jurisdiction could be established in England, sufficient to answer all the requisites in society wherein the common law was silent; and whatever might have been the admitted principles of equity adopted by the law courts, their very constitution was inadequate for the purpose of carrying them into effect.

The study of the Roman civil law, which had revived some time in the twelfth century, through the accidental discovery, as the story goes, of a copy of the Pandects (although the influence of that system of laws had never entirely ceased to exert itself in some parts of Western Europe), became enthusiastically pursued by members of the most celebrated universities in Europe. The opening of this vast mine of legal knowledge, which had been enriched by the most renowned lawyers of enlightened Rome, and exhibited the accumulated experience of ages, could not escape the attention of the clerical order, who upon every occasion were eager to strengthen their ascendancy over the rude laity. In the study of the civil law, which had not reached its climax until, under several Christian emperors it became, to a great extent, moulded in conformity with the claims and interests of the Church, the ecclesiastical body found sufficient to reward them for any amount of toil which they might expend in exploring its treasures of legal knowledge.

Independently, therefore, of the extensive merit generally allowed to this vast body of law, it must have proved an invaluable boon to the ecclesiastical lawyers of those

Revival of
the study of
the Roman
civil law.

Reasons for
its favour-
able recep-
tion among

^P Spence's Equit. Juris. 238 *n* (e).

CHAP. I.
the ecclesi-
astical body.

times, whose predecessors had carefully transmitted such fragments of the *corpus juris civilis* as had survived the destruction of the Western Empire, wherein the peculiar claims of the clergy, and the favours which they formerly enjoyed by virtue of imperial grants, were recognized and admitted. That the clerical body should therefore so cordially welcome the exhumation of the entire system of Roman jurisprudence, after it had been hidden for ages, and which they regarded as the Magna Charta of clerical privileges,—and, moreover, that they should have exerted such zealous endeavours to imbue the European lawyers with its sentiments, for their judicial and legislative guidance, may be easily imagined. Here was at once a full recognition of their claims, confirmed by imperial authority, and protected by princes who had given laws to the world.

Vacarius at
Oxford.

Vacarius, the Italian professor of civil law, the contemporary of Inerius, who taught the science at Bologna, having been induced by Theobald, Archbishop of Canterbury, to visit England, and open a school at Oxford (A.D. 1149), for promoting the study of it here, met with such success as to occasion a complaint that the imperial laws were likely to smother all the rest of the sciences.⁹

Study of the
civil law
increases.

Having these ample means of resorting to the judicial wisdom of imperial Rome, both clergy and laity had, in the course of two or three centuries, become tolerably acquainted with the maxims and principles which infused themselves into the sentences of the Roman jurists; and thus, notwithstanding the jealous opposition which this new study had, on its first introduction, to contend with from *the wicked*,^r it continued to gain ground among the common law judges and professors in England.

Principles
and maxims

It would have afforded a curious employment for cer-

⁹ Duck, 20.

^r John of Salisbury.

tain of our more ancient text-book lawyers, had they sat down and partially analyzed the ingredients of that production which they denominated the COMMON LAW; separating so much of it as was really indigenous and of English growth, from the maxims and notions imported into it from the Roman code, before they broke forth into such laudatory strains as they frequently indulged in when writing upon their favourite topic; indeed, their acknowledged acquaintance with the writings of the Roman jurists must have convinced them, however much against their will, how difficult it was to avoid a conclusion, which was doubtless by no means flattering to the native independence, and to the mysterious basis upon which that independence has been reared. It is scarcely possible to suppose that any well-read lawyer, captivated as he may be with the notion of Saxon liberty, can proceed far in the study of either system without perceiving a striking analogy between the civil law of Rome and the common law of England, not only as to their maxims and principles, and their technical phraseology, but also their method of practice, showing how early, and to what extent, one system became the instructor and guide of the other. To some minds there is a black-letter witchcraft* in the

CHAP. I.
—
of the Roman law gradually insinuated themselves in the rise and progress of the common law of England.

* The reader of Blackstone cannot but observe the enthusiasm in which he indulges whilst panegyricizing the institutions of his country, of which he was perhaps so justly proud. Upon one occasion, the stability and antiquity of our legal system rears itself up before the elegant and picturesque fancy of that distinguished judge in shape of some venerable fabric of baronial origin.—“Our system of remedial law,” says he, “resembles an old Gothic castle, erected in days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless—and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches be winding and difficult.”—B. iii. 268.

CHAP. I. — expressions, “Anglo-Saxon liberty,” “ancient constitution,” and the like, whilst the chances are that, in furnishing an example, they may not unfrequently fall into the whimsical position of seizing upon some relique of Roman jurisprudence, to prove the perfection and justice of their own.*

When we remember that the Romans held possession of this island nearly five hundred years,—and, during that period, some of the most celebrated lawyers administered justice among the conquered Britons, upon the like footing and according to the same system adopted by the conquerors in their own country,—we cannot be

* Sir W. Jones, in his well-known Treatise upon the Law of Bailments, when speaking of the obligation which binds a person to whom a gage or pledge is bailed to take *ordinary* care of it, and therefore responsible for *ordinary* neglect, has the following observation:—“This is expressly holden by Bracton: and, when I rely on his authority, I am perfectly aware that he copied Justinian, almost word for word; and that Lord Holt, who makes considerable use of his Treatise, observes, three or four times, ‘that he was an old author;’ but, although he had been a civilian, yet he was also a great common lawyer, and never, I believe, adopted the rules and expressions of the Romans except when they coincided with the laws of England in his time.”—P. 75.

It is generally admitted that the above Treatise was suggested to that accomplished scholar by the noted case of *Coggs v. Bernard* (Ld. Raym., Rep. 909), and which he himself calls a commentary on it. This case arose upon the question, whether a person, who had made a *gratuitous* promise to remove certain goods, was responsible for damage occasioned by his neglect in its performance. It came before Lord Holt, and drew from that celebrated lawyer a full and clear exposition, or, according to the words of Mr. Hargreave (Co. Litt. 89 b. n. 3), “a most masterly view of the whole subject of bailment.” But, although the point appeared to have been a new one in our courts, and was at that time thought worthy of the deliberation which it received, yet it must be confessed that the judgment is based entirely upon the doctrine of the civil law of Rome.—*Vide* Just. Inst.; Hein. Elem. Jur. Civ. “De Oblig.”

surprised that such an event had its due influence in stamping a character upon the future institutions of this country, more especially as the Romans imposed their language, as well as their customs, upon the newly-acquired colony.*

The great influence which the ecclesiastics had in all judicial proceedings among the Anglo-Saxons, by reason of their acknowledged superiority both in legal science and in general literature, together with their partiality to the Roman system, would enable them almost imperceptibly to instil the doctrines among the laity which they themselves so highly revered, and which the clergy regarded as the only source of judicial redress when any matter of doubt was reserved for their decision. The same influence in matters of state, and also of legislature, was still permitted and exercised among the clerical body after the Conquest, as was exerted during the Saxon period of our history; for when the Conqueror held his court three times a year, in continuance of his Saxon predecessor's custom, the bishops, earls, and the greater and lesser barons, together with the knights, assembled. The council which attended the king's person remained the same, as did also the great council, or wittena-gemote, which was formed of the other council, in addition to a large concourse of proceres, with the king at their head. This great assembly was wont to be convened for purposes of legislation, and other important matters which

Reasons of its influence upon the common law, and its reception among the laity.

* According to the opinion of Ings, Chief Justice of the Common Pleas, the common law was founded upon the civil law of Rome, as appears from the Year Book, 5 Edward II., 148:—"Qu respondez vous," said that judge to the bar, "a la loy empiel dōqes sur quel ley de terre est fondu, et qz veot 'q heritage soit descendu à plus digne quòd possessio fratris facit sororem heredem? Devom; lei empiel ple tout en droit, mes nous sumes en la possession, et rien demâdoins p will."—C. P. Cooper's Append. 553.

CHAP. I. — emanated in the king's name; and, although perhaps a little modified by time and circumstances, it is generally admitted to have formed the basis of the Privy Council and House of Lords (*domus procerum*) of the present day. Although there be very little similarity between the chancellors as they existed in those days of the Saxon dynasty and their important office in our modern times; yet, if we consider the power and dignity of the sovereigns in those earlier periods of our own history, we shall not discover so great a disproportion between the king and his chancellor or bocara or secretary as he might be called, as between the sovereign and the chancellor in more modern times. The Saxon king might indeed be considered as little better than a chief among chieftains, and at the best but the sovereign of a small territory, whilst the chancellor was himself generally an ecclesiastic; one of a body of men who were for the most part the depositaries of all the learning both ancient and modern in the days of our unlettered ancestors, and therefore became an essential personage in all affairs wherein a deed or any other formal instrument was to be used, and bearing in mind their acquaintance with the literature and laws of ancient nations, and especially with those of Rome, we can well conceive the influence they possessed among our warlike but illiterate ancestors. That this was their principal office among the Anglo-Saxons is certain, and even for some time after the Conquest their office was not in any respect different, although subsequently they gradually rose to the highest importance. Not long after the coming in of the Norman race, the chancellor subscribed his name, not on account of his office as such, but merely by virtue of his ecclesiastical order, and as the chief among the royal chaplains to whom was entrusted the custody of the documents which were kept in the king's chapel, and also of the royal seal.

For as the Anglo-Saxon kings used to sign their deeds with the Cross, so the Normans were accustomed to affix their seals to all important documents.^s

There were very few persons who, before the Conquest, were skilled in the law except the clergy; and they really possessed the only learning of the times: thus it continued long after that event. In the reign of William Rufus, Alfwin, rector of Sutton, and several monks of Abingdon, were so famous for their knowledge of the laws, that they were universally consulted, and their judgments frequently submitted to, by persons resorting thither from all parts: another of the clerical order, named Ranulph, about that time, obtained the character of *invictus causidicus*. Indeed, the clergy seem to have been the principal practitioners, and were the persons who mostly filled the bench of justice; and so general had this custom become, of clergymen betaking themselves to the study, that it was remarked by William of Malmesbury, "*nullus clericus nisi causidicus*."^t

Clerical
lawyers.

The chancellor—who was the highest subject in the realm, both in respect to his judicial and political functions—sometimes united with these sources of influence that of being the chiefest in rank to which a member of the clerical body could aspire.* The student has only to be reminded of those two ecclesiastics, whose ambition and greatness rendered them the objects of jealousy, even to the powerful monarchs under whom they respectively lived—namely, Thomas A'Becket, Archbishop of Canter-

Ancient
office of
chancellor.

^s *Vide* Hicks' Dissert. 46.

^t Reeve's Hist. of Eng. Law.

* From the reign of Henry II. to 21st of Henry VIII., the chancellors were generally ecclesiastics. The first common lawyer appears to have been Lord Rich, who was by the last-named monarch made chancellor.—Duck *De usu et auctor.* 29. Under Queen Mary, Bishop Gardiner became lord chancellor.

CHAP. I. bury, Chancellor to Henry II.,—and Cardinal Wolsey, whose history unites itself almost inseparably with that of Henry VIII.,*—and he will have no difficulty in accounting for that vast influence which, with their predilections and previous education, the clerical chancellors exercised in amalgamating the principles and doctrine of the civil law into that system which we now recognize as the common law of the land. The reason why the common law judges, in subsequent times, did not more frequently apply to the imperial law for direction was (it would seem), that the judges, aided by the legislature, had erected such a system of jurisprudence out of those sources before alluded to, as to render further reference to the Roman civil law no longer necessary;^u moreover, when the prerogative of grace, originally inherent in the sovereign, was by Edward III. referred to the chancellor, and the Court of Chancery became established upon a foundation which rendered an application to the Roman law less frequent and necessary, a greater confidence began naturally to be engendered towards a tribunal which experience soon taught provided a more perfect remedy than any other court of judicature, and thus gradually to silence all opposition from the judges of the common law, whose legal acumen, and superior station, would be most likely to detect any violation of those

* "It is thought that this court of equity began under Henry Beaufort, son of John of Gaunt, that great Bishop of Winchester, afterwards cardinal in the reign of Henry V. and in the beginning of Henry VI., and increased while John Kemp, Bishop of York and Cardinal, was lord chancellor in the 28th year of Henry VI.; but it increased most of all when Cardinal Wolsey was lord chancellor of England, anno 8 Henry VIII., and continued until the 21st year of the same king; of which the old saying was verified, 'that great men in judicial places will never want authority.'"—4 Inst. 553.

^u Spence, Eq. Juris. 126.

principles which the very existence of a court of equity CHAP. I.
was intended to enforce.

Great indeed must have been that power which, de- Progress of
the Court of
Chancery.
pending upon the mere grace of the sovereign, could, amidst the jealousy of our ordinary judges, who were taught to regard the principles of the common law as the perfection of reason, establish an almost paramount and independent jurisdiction in our country; a jurisdiction which did not scruple to adopt both the maxims of the prætorian law of Rome and the common law of England, so far as they accorded with the strict claims of justice, but throwing them aside whenever they interfered with those claims. Being once established, however, the courts of equity, by an application of their own flexible rules of practice, were often found acceptable in moderating the severity of the ordinary tribunals, and supplying their deficiency when a rigid adherence to those maxims which fettered their proceedings would have resulted in oppression and injustice. But, notwithstanding the suspicion which was manifested by the judges who presided over our common law tribunals, and the opposition it encountered from the barons of the realm,^v the Court of Chancery, sanctioned by the great council of the nation, increased in power: for, amidst the stormy and unsettled character which marked the early period of our history, there was found no other tribunal sufficient to redress those instances of outrage and rapine, whose frequent occurrence required the prompt and energetic interference of some court of competent authority, possessing internal resources sufficiently available to render a certain and salutary protection to the parties aggrieved.

The exclusive power of examining an offender personally upon oath,—the exercise of its preventive jurisdiction to restrain a threatened grievance,—and giving compen-

^v Duck, De Usu, 26.

CHAP. I.

sation in cases where the ordinary tribunals could only punish criminally,—rendered the Court of Chancery a place of resort for all persons against whom the courts of ordinary jurisdiction were virtually closed.

The Court
of Chancery
a distinct
tribunal.

By these means the Court of Chancery, about the reign of Richard II.,* became established as a distinct tribunal, governed by its own rules and maxims, partaking largely of those principles of equity and conscience which the system of Roman law afforded, and to whose fountains they had a constant access in any case of doubt and uncertainty.^{w†}

* Hardy fixes it sometime in Edward III.'s reign.—Introduct. to Close Rolls, 28.

^w Spence, Eq. Juris. 345.

† Lord Coke, Artic. sup. Char., says that “the first decree in Chancery made by the chancellor was in 17 Richard II. (Rot. Parl., 17 Richard II., no. 10), when John of Windsor complained in Parliament against Sir Richard le Scrope, requesting to be restored to certain manors in Cambridgeshire, which were adjudged and ordained to him by the king's award, then being in possession of Sir J. Lisley, and then withholden by Sir Richard le Scrope, who, by champettry, bought the same. The Parliament compromitted the matter to the king's order and award: the king committed the same to his council; who, upon hearing the same, adjudged the matter in dispute for Sir John de Windsor under the privy seal, and sent a warrant to Arundel, Archbishop of Canterbury, then chancellor of England, to confirm the king's award, made by advice of his council, who confirmed it by decree, and granted an injunction under the great seal against Sir John Lisley.”—4 Inst. 553.

The distinction between the two jurisdictions of equity and law in administering relief, soon became, after a certain fashion, generally felt and acknowledged throughout the nation: at any rate it could not fail of being observed and seized upon by some of our quaint, deep-thinking, and, withal, graphic divines of the puritan school, for the sake of illustrating a point, or giving force to the argument. Hence Thomas Adams, a puritan conformist divine, in one of his sermons, during the early part of the reign of James I., addressing the natural man, has the following:—“Lo, now the witnesses (thy

Amidst the attempts, on the people's part, to subvert the equitable jurisdiction of the Court of Chancery, their greatest rancour appears to have been levelled against the writ of *subpœna*.^{*} "The general distaste," says Mr. Hardy,^x "exhibited by the Commons, in their petitions, during several years after the first use of this writ, was remarkable; and their feelings on the subject may be estimated by the uncourteous way they spake of the framer of the writ."[†]

CHAP. I.

Writ of sub-
pœna: how
regarded.

From the reign of Edward IV. the Court of Chancery appears to have proceeded by degrees to strengthen, if not to enlarge, its jurisdiction, without any further interference with its authority, whatever secret feelings of hostility might remain against its existence; for both the Council and the Chancery had become engrafted in the constitution itself:^y thus, to offer opposition to the one

Court of
Chancery
increases in
strength.

conscience and thy life): thou art gone at the common law of justice; it is only the Court of Chancery that must clear thee."—Sermon on the Three Divine Sisters.

* "The process of the great seal was by *subpœna*, and sometimes by *hab. corp. coram consilio*, or *coram consilio in cancellariâ*; and these processes were returnable, for the most part, in Chancery; yea, in cases where the cause was depending singly, *coram consilio*."—Hale's Jurisd. H. of Lords, 44.

To show the superiority of the Court of Chancery beyond that of any other tribunal, the method of summoning a person before each has not been overlooked: *e.g.* the party required to appear *coram rege et consilio*, when he was summoned to the Council or the Star Chamber; but when his appearance was required in Chancery, it was sometimes *coram rege* only, without the adjunct *consilio*.—St. 1 Ed. III., cap. 9. Append. to Ch. Rep. 13:—"But for a truer mark of superiority, the chancellor is *secundus à rege*. The teste of the Chancery is *meipso*, whereas the teste of the King's Bench is *J. B. Milite*."

^x Introd. to Close Rolls, 30.

[†] "Item priont les Communes," etc. (from MS. taken from Hardy, 30. Rot. Parl. 3 Hen. V.)

^y Palg. Com.

CHAP. I. might have been construed into a species of treason against the other. Little alteration, however, was effected in the practice and authority of either the Council or the Court of Chancery from the above period until the reign of Henry VIII., when the separation took place between the Privy Council and the Star Chamber, which had, at that period, acquired considerable celebrity, by reason of its extent and the authority of its jurisdiction; although it had not attained its full maturity until the reign of Elizabeth.

Indeed, it can be no matter of surprise, that a court, thus established, and unfettered by maxims which owed their origin, in a great measure, to our feudal system, should take advantage of every opportunity to give evidence of its utility, by applying a remedy in those cases where either the ordinary tribunals were silent, or even, if they did recognize a right, were, from circumstances, incapable of affording a perfect remedy, and which therefore called for some extraordinary interference, either from the sovereign himself, or some power especially delegated by him. As to those cases of fraud, covin, circumvention, accident, or mistake, and other matters relating to conscience and faith, the English common law system was extremely defective in applying relief.

Benefit of
Roman civil
law in regu-
lating the
Court of
Chancery.

The judicial system, as organized at Rome, and which we have received from the *Corpus Juris Civilis*, offered us two methods for filling up that which was wanting in our own practice. "The one was," says Mr. Spence, "for the chancellor to supply the deficiency of the law, by introducing a *jus honorarium*, to be administered by the courts of law; the other was to resort to the prerogative in each particular case where no remedy, or an inadequate remedy, was provided by law:^z although such an exercise of the prerogative by any general regulations

^z Eq. Juris., 325.

was excluded; for it required the assent of the great council, since no new writ could be found to issue but by the king and his council. CHAP. I.

The idea of a court of equity, as one of appeal from inferior tribunals, seems to have been no new thing; for, during the Saxon dynasty, independently of the king's select committee, and of the great council assembled for the purpose of legislature, the king, as the fountain of justice, was wont to hear and determine matters referred to him upon principles of equity, in cases where the strict rules of the common law would have been too oppressive;^a the ecclesiastics being in those times the instigators and promoters of such a system: and, as the chancellor was employed to make out the royal charters and precepts, the task also of mitigating or supplying the deficiency of the positive law was sometimes expressly delegated by the king to the chancellor in his court, and thus the extraordinary jurisdiction, even at that early period, began to be shadowed forth in the Court of Chancery. Antiquity of the equitable tribunal.

The general eruption which followed the Norman Conquest did not, so much as might be imagined, disturb the arrangement of our judicial system. The different courts of ordinary jurisdiction, which had been established or encouraged under the Saxon kings, continued after the same order, and were governed by the same rules, under the Norman dynasty.^b The king was considered the fountain of law, and the head of all judicial authority; for, even in periods long before the Conquest, the kings were taught, through the influence of the clergy, to assume (not unwillingly) the titles, together with the rights and prerogatives, which they had borrowed from imperial Judicial system before and after the Conquest.

^a "Si jus nimis severum sit, alleviatio deinde quærat^r apud regem, et nulla mulcta culpæ pecuniaria superat æstimationem capitⁱs."—Anc. L. tem. Edg. Wilk. p. 77.

^b Hale's Hist. C. L. lib. ii. c. 5.

CHAP. I.

Rome:^c whilst the sovereigns in their turn showed themselves by no means ungrateful to their spiritual guides, loading them with privileges and grants corresponding with their services. This mutual understanding, and reciprocity of kindly services between the king and the clergy, continued in unabated force until such a period of our history as it would be a matter of delicacy to particularize.* We find also among the most prominent

^c Duck, 17.

* It is rather surprising, when we consider the unsparing and vainglorious epithets that were heaped upon the monarchs of former days by an obsequious clergy, among which appear titles like the following,—*Christi Vicarius, Dei Vicarius* (Wilk. 113, tem. Æthelb.),—implying thereby the divine right of kings, the same compliment was forgotten to be awarded to the authors themselves until the reign of Elizabeth, when the Church was reminded of its negligence in this particular by Bancroft, the archbishop's chaplain (afterwards Bishop of London), who, in a sermon preached at St. Paul's Cross, January 1st, 1588, first publicly broached the notion respecting the right divine of bishops. The idea might probably have had its germ in some of the olden writers, who show that in certain proceedings the King and the Church went hand-in-hand. One of the laws of King Edgar has the following commencement:—"Jubeo ego et archiepiscopus," etc.—Wilk. 79. "*Dominus papa videlicet in rebus spiritualibus quæ pertinent ad sacerdotium et sub eo archiepiscopi, episcopi, et alii prælati inferiores. Item in temporalibus sunt imperatores, reges, et principes in iis quæ pertinent ad regnum.*"—Brac. f. 5.

In one of those persecutions which raged against the non-conformists during the reign of Charles II., we are told that the pulpits resounded with the doctrine of passive obedience and non-resistance, which was now universally preached. The clergy seemed to make it their business to surrender to the king all the liberties and privileges of the subject, and to leave them only an unlimited obedience. "According to the principles publicly preached," says Rapin, "no Eastern monarch was more absolute than the King of England. This doctrine was supported in the courts of justice by all the judges and lawyers, to the utmost of their power."—Hist. of Eng. ii. b. 23. 725; Neale's Hist. of the Puritans, iii.

members that composed the king's council, appeared the higher dignitaries of the Church, who exercised a vast influence in the Great Council also, and who, by reason of their ordinary pursuits, as well as their skill in the science of jurisprudence, were in general requisition whenever new laws were about to be framed having for their object the civil rights of the people.

Among other remnants of Anglo-Saxon origin that survived the Conquest, for judicial and political purposes, were, as before noticed, the *Council*, which generally attended the royal person, and formed a kind of standing retinue of legal and political advisers during his progress throughout the kingdom. There was also the Great Council, which subsequently became distinguished by the name of Parliament; so called in contradistinction from the select or Privy Council; although, when sitting for public business, it embraced each member of this latter council also, in his individual capacity; the king himself presiding over both assemblies.^d The king's ordinary or Privy Council (the usual style by which it was distinguished from the reign of Edward I.) appeared, according to the opinion of Mr. Hallam,^e no other than the ancient *curia regis*; since it had, in a principal degree, the like objects of deliberation, and was composed of the same persons, consisting of the chief ministers: these were the chancellor, the treasurer, lord steward, lord admiral, lord marshal, the keeper of the privy seal, the chamberlain, treasurer and comptroller of the household, the chancellor of the exchequer, the master of the wardrobe, and also of the judges, the king's serjeant and attorney-general, the master of the rolls, the justices in eyre—who were not at that time the same as the judges at Westminster. When these were called together, it was a full council;

Council:
Great and
Privy.

^d Hallam, *Mid. Ages*, iii. 213; *Palg. Counc.* 20.

^e *Mid. Ages*, iii. 205.

CHAP. I. — but when the business was of a more contracted nature, those only who were fittest to advise were summoned; the chancellor and judges, for matters of law; the officers of state, for what concerned the revenue or household.

The king,
the fountain
of justice.

When Henry II. established a judicial tribunal, as the *curia regis*,^f the prerogative of finally deciding the law, and of invoking, when needful, the aid of the council, was reserved to him, as the fountain of justice and equity. In succeeding reigns, however, the kings, by reason of their more active engagements in war, or from a disinclination to fix themselves down to the onerous duties of superior judge, resigned those responsibilities to others whose pursuits and peculiar studies rendered them fitter to discharge that office. The select committee was, therefore, the body to whom these duties were assigned: "In it," says Sir M. Hale, "there was lodged the plenitude of all civil jurisdiction."^g At the head of this *consilium sapientium regni* was the chancellor; for, as he was the king's principal chaplain and confessor, he was supposed to be possessed of a more intimate acquaintance with the king's will and pleasure than any other dignitary; hence he was called the keeper of the king's conscience.^{h*}

Chancellor,
the lord
keeper.

Description
of the chan-
cellor; his
functions.

"The chancellor," says Lord Ellesmere, in his somewhat quaint and figurative style, "is generally the mouth, the ear, the eye, and the very heart of the prince; so is

^f Benedict Abbas, 266. ^g Jurisd. of the House of Lords, 96.

^h Selden's Off. of Lord Chanc., sec. 3.

* The Select Council often commented severely on the decisions of other Courts, and often proceeded to the execution of justice in the first instance, without the assistance or advice of the other branches of government;—"and well it might," says Sir M. Hale, "as it was not only composed of the wisdom of the nation, but also of the great officers of state. The chancellor, treasurer, justices of each bench, and barons of the exchequer, all active members of it, assisting with their knowledge and advice the less experienced."—Hardy, Pref. 26. Rotu. Lit. Chan.

the court, whereof he hath the most particular administration, the oracle of equity, the storehouse of the farm of justice, of the liberality royal, and of the right prætorial, which openeth the way to right, giveth power and commission to the judges, hath jurisdiction to correct the rigour of the law by the judgment of equity and grace. It is the refuge of the poor and afflicted. It is the altar and sanctuary for such as, against the right of rich men and the countenance of great men, cannot maintain the goodness of their cause and truth of their title; the entry and door whereof ought *patere omni postulanti omnibus horis, nulli tamen hiare*, which is meant not to gape after such men as bring rewards, or such access to the help thereof by corruption.”ⁱ

According to Blackstone,^j when the *aula regia* was broken to pieces, there existed no idea of a court of equity, as distinguished from a court of law, in the original plan of partition; for, though equity is mentioned by Bracton,^k as a principle in opposition to strict law, yet neither in his writings, nor in those of Glanvil, nor Fleta, is there any word mentioned respecting the equitable jurisdiction of the Court of Chancery. He conceives it, therefore, to be a probable conjecture that when the courts of law, proceeding merely upon the ground of the king’s original writs, pronounced a harsh or imperfect judgment, application for redress used to be to the king in person, assisted by his Privy Council. These were wont to refer the matter of complaint either to the chancellor or a select committee, or by degrees to the chancellor only, who, upon weighing the merits of the case, mitigated the severity, or supplied the defects, of the judgment at law.

Destruction of the *aula regia* increases the chancellor’s power.

With respect to the Select Committee, or Privy Council

Select Committee, or Privy Council.

ⁱ Observations, 21.

^j Comment. b. iii. 50.

^k Lib. ii. cap. 7, fo. 23.

CHAP. I. —the organ of the king's executive authority—its constitution appears to have been twofold: its deliberative office, for advising with the king; and its decisive power of jurisdiction. The former comprehending all subjects of political deliberation referred to it by the king, as the governing council of state. In virtue of these departments, there were also many petitions presented by aggrieved parties for advice; which the Council either transmitted by indorsement to the proper courts—the Chancery or King's Bench,—or directed the suitor as to the remedy he ought to seek; others were reserved to be heard "before the Council," and so indorsed;* whilst some which related to the king's interest were referred to the Chancery, or to select persons of the Council. The other branch of the constitution of the Privy Council,—namely, its decisive power, or, in other words, its coercive jurisdiction, was divided into acts, both legislative and judicial; under the former were many ordinances made, which had not the effect of an Act of Parliament; and it appears from the petition of the Commons, xiii. R. 2,¹ that no ordinances were valued which were contrary to the common law or statutes of Parliament. The judicial power of the Council was, in some instances, founded upon particular Acts of Parliament, empowering it to hear and determine certain causes: but, it would seem, that, independently of this delegated authority, the king's council exercised, as well out of Parliament as in it, a most extensive jurisdiction, both as to criminal and

* Several entries on the Close Rolls, containing petitions, and the answers of the Council as written on such petitions, of which the originals are preserved in the Tower, are as follows:—"Sue at common law," "Sue in the Exchequer," "Sue in Chancery" (*i. e.* before the ordinary jurisdiction of that Court), "A writ on the subject shall be dispatched out of Chancery," "The king will consider," etc. —Hardy's *Introd. to Close Rolls*, 26, pref.

¹ Rot. Parl. iii. 266, no. 30.

civil causes;^m although this stretch of power was, by the Hampdens of those days, regarded as an encroachment upon the common law, and a violation of the benefits given to them by Magna Charta, in one of its most important articles,—namely, the right of trying questions relating to property by peers. This occasioned two statutes to be passed by Edward III.; one in the fifth year,ⁿ the other in the twenty-fifth year, of that monarch's reign.

The civil jurisdiction of the Council was, for the most part, in after-times, exercised conjointly with the Court of Chancery; for, as the proceedings before both tribunals professed to be conducted upon equitable principles, that court, which was essentially a court of equity, supplied the Council with its rules and maxims, when called upon by virtue of its appellant jurisdiction to determine those cases referred to it from the courts of common law; and the Chancellor being entrusted with the custody of the great seal, the *Consilium Regis* generally adopted their process from it.^o According to the opinion of Sir F. Palgrave, the first outline of the Court of Chancery was borrowed from the Council, and the authority of the

Jurisdiction
of the Privy
Council
concurrent
with that of
the Court
of Chancery.

^m Hallam, *Mid. Ages*, iii. 208.

ⁿ “Also it is recorded and established, that no man from henceforth shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seized into the king's hands against the form of the Great Charter.”—5 Edward III. c. 9; Rot. Parl. ii. 228, no. 16.

“That none shall be taken by petition or suggestion made to our lord the King, or to his Council, unless it be by indictment, or presentment of the good and lawful people of the same neighbourhood where such deed be done, and in due manner, or by process made on writ original at the common law; nor that none be put out of his liberty nor of his freehold, unless he be duly brought into answer, and forejudged of the same by course of law; and, if anything be done to the contrary, it shall be redressed and holden as void.”—25 Edward III. st. 5, c. 4; *ibid.* 239, no. 19.

^o Hale's *Jurisd. of H. of Lords*, 44.

CHAP. I.

Council
exercises
itself in
matters
both civil
and criminal.

chancellor was strengthened by continued delegation from the Council.^p

The judicial business of the Council, as before remarked, exercised itself both in criminal and in civil matters. Its interference in the former branch of jurisdiction appears to have originated in those cases of oppression and outrage, which were but too characteristic of that early period, and the incompetency of the ordinary tribunals to afford relief; especially when the rank or position of the offending party presented an obstacle to a fair determination of the question of right; and, as much tyranny and injustice might be endured by the poor from their more powerful and opulent neighbours, in those loose and distracted times, when the arm of justice was but feebly stretched forth, the Privy Council seems to have taken the cause of the poor under its peculiar protection: hence the imposing invocation that terminated most of their petitions—"for God and in work of charity," or "at the reverens of God and in the way of charitie"^q—found, as far as practicable, a seasonable response from the remedial functions of the criminal side of the Council.*

Habeas
Corpus.

Of no little importance also was the writ of *habeas corpus cum causa*; which issued whenever a party was imprisoned under the process of an inferior court: it was made returnable in Chancery, in order that the defendant might be dealt with by the superior authority of the

^p Counc. 95.

^q Palg. Counc. 81-94.

* "Item—that the clerc of the Counsail be sworn that, every day that he the Counseill sitteth on ony billes betwyx partie and partie, shall, as far as he can, aspye which is the porest suytur's bille, and that first to be redd and answered; the king's sergeant to be sworne, trewly and plainly, to yeve the poor man, that for suche is accept to the Counsail, assistense, and trewe counsaill in his matere so to be suyd, wythoute any good takyng of hym, on peyne of discharge of ther offic'."—Rot. Parl. 2 Henry VI. 201.

Council.* This process was issued by virtue of that branch of the court which may be termed the mixed jurisdiction of the chancellor. A defendant, arrested upon any obligation or bond, extorted by fraud or duress, was relieved by this writ, when the nature of the instrument could be examined and investigated.^r The power of issuing writs also into all special jurisdictions or franchises, as Wales and Ireland, together with other exclusive rights, tended to increase the extraordinary jurisdiction of the Council to an extent far beyond the powers that were incident to any other court of law: of this important exercise of jurisdiction, the Court of Chancery (being conjoined with the civil proceedings of the Council, and usually named together in the same petition) frequently in a large measure partook.

As to the other branch of jurisdiction,—namely, the *civil* business of the Council,—it extended itself to such matters also as were not within the reach of the inferior courts of common law, and which form no inconsiderable part of the chancellor's judicial functions at the present day; such as matters of fraud, covin, deceit, and disho-

Civil business of the Council.

* Palgrave gives a description of two bills, or petitions, presented to the Council by persons in very different ranks of life. The one is by John Rukke, husbandman, of the town of Monteneys (Moutte), in Essex, falsely imprisoned, and forcibly disseised of his tenement, against all right and conscience; upon which a double remedy was afforded,—a writ of *habeas corpus cum causa*, returnable in Chancery, and a subpoena, returnable before the King and Council. The other was by John, Lord Strange: Roger Kynaston, the second husband of the Lady Elizabeth, the widow of Richard, Lord Strange, and mother of the complainant, unlawfully retaining possession of certain lordships in Shropshire, Wales, and the Marches, in which the Lady Elizabeth (then deceased) had only a life estate. His ordinary remedy was at law; but the power of the disseisor induced the plaintiff to bring his suit before the Council.—Counc. 90.

^r Palg. Counc. 96.

CHAP. I.

nesty; to which also may be added the prerogative writ of *ne exeat regno*, issued against foreigners seeking a departure to avoid their just debts:^s and, after the various branches of the common-law jurisdiction became separated into as many distinct courts, about the time of Henry III., all questions relating to breaches of faith (*fidei læsiones*), and oaths (*juramenti transgressionones*), and also affairs of trust, which had been granted to the clergy by Richard I., as matters for their peculiar cognizance,^t were, with the exception of the probate of wills in personal estates, taken away from the ecclesiastical courts, and thenceforth could only be relieved against by petition to the King in Council; which branch of jurisdiction subsequently fell into the exclusive province of the Court of Chancery. From the early part of the reign of Richard II., to the end of Edward IV., in which interval the practice of the Council was conducted with great regularity, in cases of misdemeanor, the parties brought before the court were generally examined *ore tenus*, and frequently without having any bill or articles exhibited to them: the offender does not even appear to have been sworn, for the purpose of verifying his answer; but he was sometimes subjected to an oath, as a bond upon his conscience.^u

Method of
procedure
peculiar to
the Court of
Chancery.

After the Court of Chancery became established as an independent and distinct jurisdiction, it still retained its own peculiar mode of procedure, which it had exercised in conjunction with the Council; although, probably, its entire separation from the Council was not effected until a subsequent period. From the reign of Henry VI., the jurisdiction of the Chancery Court, although very extensive, became more especially resorted to for the purposes of affording relief against fraud, deceit, or force; for it was

^s Palgr. Coun. 37.

^t Glan. 10, c. 12; Bracton, 175 a.

^u Palg. Counc. 86.

now that the court had arrived at its full development, in all its branches of judicature, and bills began to be filed; suits were also instituted for perpetuating the testimony of witnesses: the examination, being taken by commission, was certified in Chancery. Possession of property, the subject of litigation, was enforced under the authority of the court; and every other case of a similar character was cognizable under its ample jurisdiction.^v

It was during the fifteenth year of the above-named monarch's reign that the people, either from a national jealousy of the growing influence of a jurisdiction distinct from the common-law tribunals, or an instinctive horror (even in those days) of the Court of Chancery, renewed their remonstrances respecting the obnoxious subpoena, when they were promised that no such writ should thenceforth be granted, until surety be found to satisfy the party so vexed for his damages and expenses. No further complaint, of which we have any record, was afterwards made by the Commons against the growing power of the equitable jurisdiction; and, in the seventh of Edward IV., when Robert Kirkham, Master of the Rolls, had the great seal delivered to him by the King, a memorandum was entered on the Close Rolls of that year as follows: "And over this the King willed, and commanded, there and thenne, that all manere of maters, to be examyned and dyscussed in the Court of Chauncery, should be directed and determined accordyng to EQUITE and CONSCIENCE, and to the old cours and laudable custume of the same Court; so that if, in any of such maters, any difficultie, or question of lawe, happen to ryse, that he herein take th' advis and counsel of sume of the kynge's justices, so that right and justice may be duely ministered to every man."

The writ
of subpoena
disliked by
the people.

"From this time," says Mr. Hardy,^w "the jurisdic-

Court of
Chancery

^v Palg. Counc.

^w Introd. xxxi.

CHAP. I.
 ———
 increases in
 power and
 importance.

Opposition
 of common-
 law judges

tion of the Court of Equity went on smoothly, and the chancellor daily acquired additional power and importance, transacting everything *vice, nomine, et loco regis*, and deciding causes by the rules of his own conscience: in fact, he had become sole judge in matters of equity, and almost possessed *potestatem absolutam*.* There is, however, abundant evidence to show that, although the Court of Chancery might be allowed to exercise its general power in matters which come within its equitable or extraordinary jurisdiction without any popular complaint, there were cases wherein its interference formed the source of continual bickerings and jealousies between the chancellor and the common-law judges. These contentions arose by reason of the power which the Court of Chancery assumed, of arresting and controlling by injunction^x the business of the ordinary tribunals, not only during mesne process, but even after judgment, whenever an irreparable hardship, but for such interference, might ensue. Hence the Court of Chancery had to contend with much opposition from the courts of King's Bench,

* "A l'époque où les tribunaux furent divisés et rendus sédentaires, le chancelier s'était arrogé le droit de juridiction autrefois réservé au roi et à son conseil."—Lettres sur la Chancellerie, etc., par M. C. P. Cooper, 164, ed. 1828.

The reason is evident, when we consider that, for a considerable period after the authority of the Council had been established, petitions were still directed to the king, as the fountain of *justice* and *equity*; but these were, in almost all instances, referred to the Council, which, in its turn, handed them over to the chancellor: and, notwithstanding the *Concilium Regis* continued for more than three centuries a separate and independent body from the *Commune Concilium*, until, in process of time, it became superseded by the Court of Chancery, yet the people found it more convenient to address their petitions in the first instance to the chancellor, being well aware that they would be ultimately referred to him.

^x Append. to Ch. Cas. temp. Car. I. and Car. II., 14. *Vide* some of the cases of injunction. Sir H. Seton, Early Rec. 131.

Common Pleas, and Justices in Eyre, from the reign of Henry VI. to that of James I., who, upon certificate of Sir F. Bacon, A.G., and others, that the practice of granting injunctions after judgment had been of long continuance, ordered that the ancient practice, as so certified, should continue.

CHAP. I.
to Court of
Chancery.

In following the Court of Chancery, as a court of equity, up to the time when it had established itself as a jurisdiction independent and distinct from the Council, it follows, almost as of course, to take some notice of two other branches of the Council, which also became in a measure separate tribunals—*i. e.* the Star Chamber and the Court of Requests.

The Court of Chancery formerly entertained a jurisdiction over criminal matters similar to that exercised by the Council. The chancellor was empowered, by the 2 Henry V. st. 1, cap. 9, to issue writs of proclamation, in cases of bloodshed and murder. This power was further extended by st. 33 Henry VI. cap. 1; and in such cases where any special writ was required, the application was made to the chancellor by bill or petition. The jurisdiction of the court, embracing matters of fraud or outrage, and all breaches of equity and good conscience, formed a foundation for a system of equity in civil suits. During the reign of Edward III., the Council used to hold their meetings in the Starred Chamber, for the dispatch of business. "In the twenty-eighth year of the reign of that king," says Lord Coke, "it appeared that the returns *coram nobis* were in three manners:—(1) *Coram nobis in Camerâ (Camerâ Stellatâ)*; (2) *Coram nobis quicunque fuerimus in Angliâ*, which is the King's Bench; and (3) *Coram nobis in Cancellariâ*." In the course of time, a portion of the business relating to civil rights was, by the Council sitting in the Star Chamber, assigned

Origin of
Star
Chamber.

CHAP. I.

over to the chancellor as matter fitter for his adjudication; the Council reserving to itself jurisdiction over the remainder of the business. The Court of STAR CHAMBER had now acquired its distinctive name; when an Act which was passed in the reign of Henry VII. gave it additional authority, in cases of oppression, and other exorbitant offences of great and influential men, "when," according to the words of Lord Coke,^z "inferior judges and jurors, though they should not, would, in respect of their greatness, be afraid." The offences punishable by the Star Chamber were bribery, extortion, maintenance, champarty (embracing forgery, perjury,^a dispensers of false and dangerous rumours, news, and scandalous libelling),^b false and partial misdemeanors of sheriffs^c and bailiffs of liberties, fraud, deceits, great and horrible riots, routs, and unlawful assemblies, single combats, challenges, duels, and other heinous and extraordinary offences and misdemeanors; but ordinary and such offences as might have received sufficient and condign punishment by the courts of common law, the Star Chamber did not interfere with. By the 21 Henry VIII. cap. 20, the president of the council, an officer then recently created, was associated to the chancellor, the lord treasurer, and the lord privy seal.

Proceedings
in the Star
Chamber:
how taken.

The proceedings in the Chamber were by bill or information, by examination upon interrogatories, and by examination of witnesses, and rarely *ore tenus*, upon the confession of the party under bond, which he again was obliged to confess freely in open court; and it would seem that the signature of counsel was as necessary to the written pleadings as it is to the bill and answer in Chancery at the present day: hence it was one of the misfortunes of Prynne, who had been previously disbarred,

^z 4 Inst. 63.

^a Spicer v. Read, Hob. Rep. 62.

^b Barrow v. Llewellyn, *ibid.*

^c Park v. Percival, *ibid.*

and his friend Bastwick, upon their Star Chamber prosecution, that, after their answers were drawn, no counsel, out of a dread of that tribunal, could be found sufficiently courageous to sign them.* The various pleadings were under the great seal; the process was by subpoena, attachment, commission of rebellion, etc. The punishment which the court awarded was the pillory, papers, whipping, loss of ears, tacking of ears, *stigmata* or branding in the face, etc. "It extendeth not," says Lord Coke, "to any offence that concerns the life of a man, or obtruncation of any member, the ears only excepted, and those rarely, and in most heinous and detestable offences."

Notwithstanding the Court of Star Chamber in after times fell under the just odium of an injured and insulted nation, by reason of its unconstitutional tyranny, and its subserviency to the jealous policy of arbitrary power, there did exist a period, of some duration from its first creation, when the greatest benefits resulted from the exercise of its jurisdiction. For a considerable time after the middle classes had begun to emerge from a state of vassalage into freedom, and, by a gradual increase of commercial adventures, were enabled to exchange their condition of servile dependence for comparative affluence and importance, they were but ill defended by the common-law courts from the power and influence of the nobility, who had probably witnessed, with no little jealousy, the distance between themselves and that class becoming

Beneficial influence of the jurisdiction of the Star Chamber, when not abused for state prosecutions.

Insufficiency of the law courts against the influence of the nobles.

* Prynne and Bastwick, having no other alternative, left their answers at the office, signed with their own hands; but were, nevertheless, proceeded against *pro confesso*. Burton, a clergyman, another of the defendants, prevailed with Mr. Holt, a bencher of Gray's Inn, to sign his answer; but the Court ordered the two chief justices to expunge the whole answer, except six lines at the beginning and three or four at the end: which that gentleman not submitting to, his answer was also taken against him *pro confesso*.—Neal's Hist. of the Puritans, vol. i. 595, 4th ed.

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gradually narrowed, as mercantile daring and successful industry increased. The trial by ordinary juries was incapable of withstanding the bribes and menaces of the great; and hence jurymen became proverbially corrupt. Thus it was necessary that some such a tribunal should exist, before whom the distinctions of birth and rank might afford no protection. It would be unjust, therefore, in estimating the summary and authoritative manner in which offenders were dealt with under the coercive jurisdiction of the Court of Star Chamber, not to take into the account also the lawless state of society at that period, and the comparatively impotent condition of the ordinary courts of judicature, wherein the judges themselves and the inferior officers were overawed by the rich and powerful nobles. The courts of law, it is true, if left to the free exercise of their functions, provided for the redress of every species of spoliation and outrage; but its judges, either by intimidation or undue partiality to the stronger party, "though they should not be" (to repeat the words of Lord Coke), were reluctant to enforce the claims of justice. The civil wars, which for so many years distracted the country, up to the reign of Henry VII.,—together with their invariable attendants, lawless violence and plunder,—contributed in no slight degree to render nugatory every attempt, through the ordinary channels of justice, to stem the evils which everywhere abounded. Under such a state of circumstances, the weak and unprotected would naturally look up, with a certain degree of confidence, for redress to the only tribunal that presented itself to curb the proudest noble, and overawe with its august presence the most licentious and reckless offender.

Star
Chamber at
its zenith,

The Star Chamber is supposed to have arrived at its full maturity in the reign of Queen Elizabeth;^d and,

^d Palgr. Counc.

except in political affairs, justice was administered with discretion and impartiality ; for, to use the words of Lord Clarendon, " whilst it was gravely and moderately governed, it was an excellent expedient to preserve the dignity of the king and the peace and security of the kingdom." As we have before observed, many a source of grievance and oppression existed, which called loudly for the coercion of some authoritative and inquisitorial tribunal ; but, in spite of the learning and integrity and sound intelligence of some of the judges in the upper courts of law, the course of justice became corrupted at its fountain ; and the very legal technicalities of those courts, instead of protecting, became, in too many instances, the instruments of chicanery and wrong, especially in the courts of inferior jurisdiction which were dispersed throughout the land. At such a crisis, therefore, the Star Chamber (that tribunal which governed the whole kingdom) was the only refuge in which the suitor could hope to obtain a certain and full relief ; and, until this court had degenerated into a state engine, and perverted its vast capabilities, for the sake of carrying out the arbitrary measures of government, it existed rather as a protective than as an oppressive power. We are familiarly acquainted with the most odious abuses of its authority, when the Star Chamber turned its energies to the punishment of state offences, during those feverish times in which the claims of political rights and freedom of conscience were waging a fierce warfare against kingly prerogative and episcopal hierarchy ; but we seldom call to mind its utility and moderation in its more healthy existence : from such memorials, however, of this tribunal as have been transmitted to our own times, it appears that between party and party it administered impartial justice.

"If," says Sir F. Palgrave, "the Court of Star Chamber

CHAP. I.
tem. Elizabeth.

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 ———
 Refuge for
 the inferior
 suitor.

was despotic, yet, nevertheless, it afforded an ample compensation for injuries : the Star Chamber curbed the justice and punished the gaoler; vexatious wrongs were easily and fairly redressed; and, except when the crown was concerned, the inclination of the court was generally in favour of the poor, the humble, and the oppressed." The same writer conceives it probable that, among the causes which contributed to the final separation of the Council and the Star Chamber, the creation of the office of lord president was not the least operative, as it enabled the Privy Council more effectually to sever the discussion of state affairs from the administration of justice. The Privy Council, sitting as such at Whitehall and Greenwich, gradually abandoned its criminal jurisdiction to those of its own members who assembled at Westminster, in conjunction with the justices of either bench, and under the direction of the lord high chancellor. This court, however, in its struggles with the nation, respecting the extent of its judicial authority, carried its usurpations to such a height during the reign of Charles I. as to overflow its boundaries, and thus complete its own dissolution: for, by an Act passed in the sixteenth year of that monarch's reign, c. 10, the Star Chamber, together with other jurisdictions of the same kind, were declared to be utterly abolished.*

* Sir F. Palgrave, in referring to the opinion of those who assert that, at the abolition of the Star Chamber, all that was good and salutary in its jurisdiction reverted to the Court of King's Bench, remarks that this idea is founded upon the notion that the Court of King's Bench represents the ancient Council, or *Curia Regis*; but "that Parliament, notwithstanding the great changes which have taken place in its construction, was, and is, the only tribunal to which that name can be applied. Parliament alone stands in the place of the *Curia Regis*; and all its remedial jurisdiction is in most cases exercised indirectly. It still exercises the functions of relieving or procuring redress when and where the common law has failed."—
 Counc.

The Star Chamber and the High Court of Commission, during the reign of Charles I., according to the words of Neal,^e “exceeded all bounds, not only of law and equity, but even humanity itself.” Urged on by the relentless and bigoted Archbishop Laud (whose cruelties and uncompromising severity towards all those who, in the slightest degree, in matters of church and state, incurred his displeasure, are only too well known to require comment), this court, under the prosecutions of Attorney-General Noy, became at last a reproach to the nation, and called loudly for its abolition. According to the testimony of Lord Clarendon, there were few persons of quality in those times that had not suffered or been perplexed by the weight and fears of its censures and judgments: for, having extended their jurisdiction from riots, perjuries, and the most notorious misdemeanors, to an asserting of all proclamations and orders of state, to the vindicating illegal commissions and grants of monopolies, no man could hope to be any longer free from the inquisition of the Court, than he resolved to submit these and the like extraordinary courses.^f

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Star
Chamber
and High
Court of
Commission,
tem. Car. I.
Archbishop
Laud.

The execrable cruelties which it inflicted on three of the learned profession,—Bastwick, Prynne (one of the most voluminous writers this country ever produced), and Burton,—who, while in prison under some former prosecution out of the court,* were supposed to have

Severity of
the Star
Chamber
against
Prynne,
Bastwick,
and Burton.

^e Hist. of the Puritans, i. 595.

^f Hist. of Great Rebel. i. 499, 8vo.

* Prynne's former incarceration was on account of his famous 'Histriomastix,' a work levelled against stage-players, containing more than one thousand pages. It was supposed to cast some reflections upon Henrietta, queen of Charles I., who not only attended the theatre herself, but also performed occasionally in the Court masques. These proofs, however slight, were sufficient in those days to form the ground of prosecution against any person

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—

employed their time in writing against the bishops and their spiritual courts, can scarcely be credited, except upon the best authority. Without any form approaching the common decencies of a trial, the court, with Laud as their principal adviser, appeared as if they were determined to crush their victims, by excluding them from all opportunity of even making their defence: the prisoners at the bar cried loudly for justice, and requested that their answers might be read; but their request was peremptorily denied, and the following sentence passed upon them:—"That Mr. Burton be deprived of his living and degraded from his ministry, as Prynne and Bastwick had been from their professions of law and physic: that each of them be fined £5000: that they stand in the pillory at Westminster, and have their ears cut off; but, as Mr. Prynne *had already lost his ears*, by sentence of the Court, in 1633, it was ordered that the *remainder of his stumps* should be cut off, and that he should be stigmatized on both cheeks with the letters S. L. (Schismatical Libeller); and all three were to suffer perpetual imprisonment in the remotest prisons of the kingdom." This sentence was executed upon them, June 30th, 1637: the hangman rather sawing off the remainder of Prynne's ears than cutting them off. They were afterwards removed to prisons in the islands of Scilly, Guernsey, and Jersey; where they were kept without use of pen, ink, or paper,* or the access of friends, till they were released by

who had proved such a scourge as Prynne had done by his never-ceasing pen.

* It seems, however, that Mr. Prynne, to whom writing was more than his necessary food, must have contrived, at least by stealth, to procure pens, ink, and paper; for, according to a modern author, notwithstanding the severity of his punishment, it was found impossible to silence him, "for he wrote away in prison as happily as if he had been in his chambers in Lincoln's Inn. It was in vain they

the Long Parliament. Laud thanked the court for their just and honourable censure of his victims, and for the defence of the Church; but, because the business had some reference to himself, he forbore to censure them; leaving them to God's mercy and the king's justice! "This barbarous sentence," says Lord Clarendon, "disgusted the whole nation."

The COURT OF REQUESTS had its origin from the Privy Council, like that of the Star Chamber, to which it bore some analogy, both as to its nature and its jurisdiction, and formed another off-shoot from the Council. It was established as a court of equity, for the purpose of granting redress to poor suitors, and such who, anciently, by supplication made plaint to the king, and were entitled

Court of
Requests.

removed him to the most distant castles,—to Dunster, Carnarvon, Pendennis, and the Isle of Jersey,—his works still came forth, dated from those places, in inexhaustible profusion."—Johnson's 'Life of Sir E. Coke.'

An account of this extraordinary person is thus given by A. Wood: "He may be well entitled Voluminous Prynne, as Tostatus Albulensis was, two hundred years before his time, called Voluminous Tostatus; for I verily believe that, if rightly computed, he wrote a sheet for every day of his life, reckoning from the time when he came to the use of reason and the state of man. His custom, when he studied, was to put on a long quilted cap, which came an inch over his eyes, serving as an umbrella, to defend them from too much light: and, seldom eating a dinner, would, every three hours or more, be munching a roll of bread, and now and then refresh his exhausted spirits with ale brought to him by his servant."—Wood's Athen. iii. 851, by Bliss.

To this circumstance Samuel Butler alludes, in the following verses:—

"Thou, that with ale, or viler liquors,
Didst inspire Wythers, Prynne, and Vicars,
And teach, though it were in despite
Of nature and the stars, to write."

Hudib. p. 1, can. 1, v. 645.

CHAP. I. to justice without paying for the same, and who, in the present day, would be allowed to sue *in formâ pauperis*. The bill contained a suggestion of the suitor's poverty, and that, by reason of his indigent circumstances, he was unable to sue at law,—or that he was one of the king's servants ordinarily attendant upon his person.^g

Petitions
to the
Council.

Under Richard II., the Council was entirely separated from the Parliament. Petitions were divided into three classes,—

1. *Bills of Grace*.—These were principally solicitations for offices, pardons, and the like; and which the king answered in person.

2. *Bills of Council*;—which could be answered by that assembly.

3. *Bills in Parliament*;—which could not be answered except by consent of Parliament.

Court of
Requests
resorted to
by inferior
suitors.

The lords of the Council were to meet between eight and nine o'clock; and the bills of the people, of *lesser* charge, were to be executed and dispatched before the keeper of the *privy seal*, and such of the Council as should be present for the time being. “From this delegation to the privy seal we trace,” says Sir F. Palgrave, “the authority afterwards claimed by that officer in the Court of Requests.” In the reign of Henry VIII., this court was composed of the lord privy seal and the master of the requests; who were, for the most part, doctors of the civil law, like the masters in chancery.^h Originally, such petitions as were exhibited to the king, and delivered to the masters of the requests, were to be perused by them; and they then directed the party to take his remedy, according to his case, either at the common law or in the Court of Chancery.ⁱ It sat regularly, and dispatched much business, until 41 Elizabeth, when

^g Sir T. Smith's Commonw.; Seton's Early Rec. 17, 18.

^h Palg. Counc. 99.

ⁱ Co. Inst. b. iv. 96.

its authority was destroyed by a decision in the King's Bench, which declared that the Court of Requests, or the Whitehall (the *Chambre Blanche* in the palace of Westminster), had no power of judicature, and that the arrest of a defendant under a bond to the sheriff, conditioned for his appearance in the Court of Requests, was a false imprisonment.

Sir F. Palgrave considers that the reason why this court lost credit before its kindred jurisdictions, and became the object of such determined attacks by the judges of Westminster Hall, was the countenance and assistance which that court gave to examination by torture: the master of the requests being usually deputed to take the examination of criminals on the rack.* Whatever existence might have remained to it as a court after the above event, it was finally put an end to by the 16 Charles I. c. 10, together with its cognate jurisdictions, when the Privy Council was declared to be a usurpation, and contrary to the law of the land.

Reasons for the earlier disuse of the Court of Requests before other similar jurisdictions.

As the principles which govern the proceedings in our Courts of Chancery, upon which we can rely with any degree of accuracy, are unfolded in the decrees of those judges who have successively contributed to rear the fabric of our equitable jurisdiction, it may not be unacceptable to the student, to lay before him a short account of the various Report-books containing those judgments and their different degrees of merit, from the reign of Charles I. to the present time; although it was not until after the Restoration, that there was any regular publi-

Principles of equity contained in the decrees of the chancellors.

No regular Reports

* The circumstance also of the Archbishop of Canterbury having prevailed upon Charles I. to direct that one-half of the masters in Chancery should always be civil lawyers, and that no others should serve him as masters of requests, added not a little to the good feeling that existed among the common lawyers for abolishing the Court of Requests.—Clarend. Hist. ii. 305, ed. 1720.

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until after
the Resto-
ration.

cation of cases reported in the court: Lord Bacon, it is true, states that he made more than two thousand orders and decrees in a year;^j he also mentions that after he was chancellor he prevailed with King James I. to appoint two reporters, each with a salary of £100 a year;^k but we have no reports of Chancery decisions until after his time. Before, however, entering upon the subject of these Reports, as they are now understood, it may be necessary to premise that the history of the Court of Chancery is considered in reference to three grand epochs of its existence: first—its ecclesiastical period; which embraced that interval between its earliest origin until the reign of Henry VIII. During this time it was under the superintendence of ecclesiastical chancellors in succession: secondly—its intermediate or secular period; *i.e.* between the appointment of Sir T. More, the first of the race of lay chancellors, and the appointment of Lord Nottingham, in the time of Charles II.; and thirdly, from the reign of that monarch—when its modern era commences—until the present time.

As the authority of the Court of Chancery was originally exercised in matters which could not be properly reached by the ordinary courts of law, and the chancellor's office was, among other purposes, established to mollify the extremity of the law, it cannot be supposed that, where no case in point could be found as a guide, the want of exact precedents would prove any impediment to the relief of a party, who happened to be aggrieved by any of those injurious acts which might fall under the denomination of accident, extremity, fraud, oppression, breaches of trust, and the like; but, in such cases, recourse would be had to first principles of equity and conscience, as deducible from the Roman jurisprudence, rather than the mere private opinion of the judge;

^j Bacon's Works, iv. 530.

^k Law Tracts, 12 (n).

and when once a sentence was pronounced it would doubtless form a precedent for subsequent cases falling within the same class. These were reported in the Year-books, from the reign of Henry VI.; but, as they were taken down by common-law reporters, they were not at all times to be relied upon:¹ the more accurately reported cases seem to have been those *precedents* which are contained in the registrar's books, from the time of Henry V., or some earlier period;* and to which the chancellors frequently appealed as the ground for their decision; although, as the clerical chancellors, during the first era referred to, were well skilled in the Roman civil law, a system of reports or precedents might not possibly have been considered so essential for their guidance, as they were for the second race of chancellors, who, as before observed, were substituted for their ecclesiastical predecessors; for, as they were not equally expert and learned in the doctrines of the civil law, and its application of the rules of equity and conscience, as was the former race, a series of decisions was now deemed to be of the highest importance; in obtaining which they were aided by the master of the rolls, and the masters, who were generally ecclesiastics or doctors of the civil law, and, according to Lord Ellesmere,^m assisted the Court to show what was the equity of the civil law: and this circumstance made them the more careful to collect and arrange the notes of the cases which they took in court, while sitting on the bench with the chancellor.

Lord Chief Justice Treby, when sitting in the Court of Chancery with Somers, L. K., Holt, C. J., and Powel,

Spence's Eq. Jur. 416-713.

* The earliest decree of which we have any account is that of 17 Rich. II. (Coke, 2 Inst. 553; 4 Inst. 83). The enrolment of decrees began in the reign of Henry VIII.

^m Observ. 37.

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B., 12th December, 1693, in the case of Lord Bath *v.* the Earl of Montagueⁿ declared that the Court of Chancery was no doubt limited by precedents and practices of former times, and that it was dangerous to extend its authority further. "If, therefore," said the learned judge, "I err in my opinion in this case, I err with these precedents on my side."

Most of the cases in the Year-books are collected by Richard Crompton, in his work entitled '*L'Authoritie et Jurisdiction des Courts*:' it was first published in the year 1594 or 1595, temp. Eliz., in the last year of the Lord K. Pickering. This collection was re-published in 1637.

Tothill.

Tothill's '*Transactions and Proceedings of the High Court of Chancery*,' were published in the early part of 1695, and re-published in 1671. They appear to be nothing more than a digest of cases, such as is found at the end of a modern volume of Reports, arranged in alphabetical order, according to the subject-matter decided.

Lord Ellesmere.

Lord Ellesmere's '*Observations concerning the Office of Chancellor*.' This is a small work which treats of the office and authority of the chancellor, and other functionaries of the court: it contains, also, an account of its jurisdiction and form of pleadings, wherein many cases and statutes of Parliament are cited. It was published in 1651.

Sir G. Cary.

Sir George Cary's Reports were published in 1650; but were first collected in 1601, by William Lambard, or Lambert,^o one of the masters. There are some others, also, of various degrees of merit, during the time of Lord K. Coventry. These were afterwards published in Nelson's Reports, and occupy a period between the reigns of Charles I. and William III., both inclusive.

ⁿ 3 Ch. Cas. 95.^o Ed. 1820.

The volumes called 'Reports of Cases taken and adjudged in the Court of Chancery, in the reigns of Charles I., Charles II., James II., and William III., and Queen Anne,' contain the earliest adjudged cases in equity. There is also another set of Reports entitled 'Cases argued and decided in the High Court of Chancery.' These extend over the *de facto* reign of Charles II., commencing with the Restoration, and embrace some few cases also in the reign of James II.; and, with the exception of the case of the Duke of Norfolk (which involved the doctrine of perpetuities), and that of *Bath v. Montague*, contained in the third volume of the last-mentioned Reports, they are not generally considered of much weight or authority, on account of their looseness and inaccuracy.

CHAP. I.
 ———
 Ch. cas.
 temp. Car.
 I., Car. II.,
 and Jac. II.,
 etc.

There are but few reports of Lord Chancellor Nottingham's* decisions, who presided over the Court of Chancery during the latter part of the reign of Charles II., although he is considered as having raised the reputation of the court to a far greater pitch of eminence than it enjoyed at any previous era of its existence. This distinguished judge having, for the few years that he held the seals, applied his vast intellect and profound learning to the duties of his high office, succeeded in establishing the jurisdiction of the court upon a basis so sound and rational, as to give a new impulse to the cultivation and study of the equitable jurisprudence: and hence we date a fresh era in the history of the Court of Chancery; from which time the decisions of succeeding judges are to be carefully studied, as containing a development of those principles upon which the court is to this day governed.

Lord Nottingham, C.

In following up the series of Reports, throughout the

* Sir Heneage Finch. He became Lord Keeper as Lord Finch of Daventry, 9th November, 1673; was made Lord Chancellor as Earl

CHAP. I. last epoch of the Court of Chancery, commencing from the reign of Charles II., recourse has been had to Professor Kent, in his 'Commentaries on the American Law.'^p This elegant writer has given us not only a description of the Reports, and the several chancellors that presided in the court, whose decisions they contain in chronological order, but also a faithful account of the reporters themselves, and their respective merits. He begins with VERNON; who was the best of the old reporters in Chancery. His Reports were published from his manuscripts after his death, by order of Lord Chancellor King, and were found to be quite imperfect and inaccurate.* In 1806, Mr. Raithby favoured the profession with a new and excellent edition of Vernon, enriched by learned notes and accurate extracts from the registrar's books; so that the volumes assumed a new dress and more unquestionable authenticity. They include part of the judicial administration of Lord Nottingham, and the whole of the time of Lord Somers; but

Vernon.

of Nottingham, 19th December, 1675 (Dugd. 118), and died 18th December, 1682.

^p Vol. i. 491, 3rd ed.

* In a case which appears reported in the 'Times' newspaper for May 28th or 29th, 1799,—*i. e.* *Hardley v. Clarke and others*,—Lord Kenyon laments the inaccuracy of Vernon's Reports, although he concluded by saying that Vernon "was the ablest man in his profession." It is difficult to imagine how an individual can, from motives of personal pique, work a certain injury to his own future reputation, unless it be the anticipated enjoyment of a posthumous bit of spleen against the lasting fame of a living adversary; but it appears that Lord Harcourt had given some mortal offence to Vernon, who practised as a counsellor regularly before him: Vernon, therefore, spitefully suppressed his best decisions, and gives doubtful ones. "I suspect," says Lord Campbell, "that the reporter may have been a Whig, and copied the Tory blacksmith, who in shoeing the horse of a Whig always lamed him."—*Lives of the Lord Chancellors.*

they give us nothing equal to the reputation of those great men. They bring the series of equity decisions down to the conclusion of Lord Chancellor Cowper's judicial career. CHAP. I.
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PRECEDENTS IN CHANCERY are a collection of cases, commencing with the reign of William III., and ending with the year 1722. To these may be added the first volume of 'Equity Cases, Abridged;' as they are generally supposed to be reported by the same author.^a The cases contained in these volumes are very brief, in comparison with the lengthy details of modern Reports; but they are of respectable authority. Precedents
in Chan-
cery.
Eq. Cas.
Abr.

We come now to PEERE WILLIAMS'S Reports, which, beginning with the reign of Queen Anne, carry on the series of decisions to the year 1735, and contain the judgments of eminent men who occupied the woolsack during that period. These Reports are esteemed as the most perspicuous, useful, and interesting repositories of equity law to be found in the language; but Mr. Cox, in his notes to the fourth edition of those Reports, has, by his learning and industry, stamped them with an additional value. The third volume, however, is not considered to be of equal authority as the two preceding ones, which were published in his lifetime. Peere
Williams.

MOSELEY'S REPORTS of cases during the time of Lord Chancellor King have received contradictory treatment from different high legal authorities. Lord Mansfield, a common-law judge, declared that it was a book not to be quoted;^r and Thompson, B., that the authority of Moseley was very small;^s but Lord Eldon—whose long acquaintance with the jurisdiction and principles of the Court of Chancery might be presumed to have given him a better opportunity for judging of the merits of the work—says he himself thought differently from Lord Moseley.

^a 3 Ves. 285.^r 5 Burr. 2629.^s 3 Anstr. 861.

CHAP. I. Mansfield on that subject, having always considered Moseley's Reports as a book possessing a very considerable degree of accuracy.^t Lord King was a distinguished scholar; and it may be considered as no little compliment to his erudition, that it was he to whom Mr. Locke bequeathed his papers and library.

Cases tem.
Talbot.

Although the career of Lord Talbot, as chancellor, was but of short duration, it was nevertheless sufficient to afford the nation full evidence of his high integrity as a man, and his qualifications as a judge. His loss was universally regretted. The cases which contain his decisions are reported under the title of 'CASES TEMPORE TALBOT,' and have a reputation for being carefully and accurately reported.

Ves. sen.,
Atkyns,
Ambler,
Dickens.

Lord Hardwicke, who succeeded Lord Talbot in the year 1736, was one of the most eminent judges that ever presided in the Court of Chancery. During the twenty years he held the seals, he bent the energies of his well-stored mind to establish our equitable system of jurisprudence upon a wise and rational foundation. No lawyer in the judicial annals of our country ever enjoyed more unqualified homage, for the extent of his learning and the solidity of his understanding, that this great judge. The reports of his decisions are contained in VESEY *senior*, ATKYNS, and partly in AMBLER and DICKENS; and, although they are not distinguished for much talent as reporters, the genius and learning of Lord Hardwicke is seen and appreciated throughout all their defects and inaccuracies. Scarcely any judge, however eminent, has ventured to question the authority of his decisions.

To be the successor of Lord Hardwicke required a judge of rare and vigorous intellect, and whose knowledge of the law was profound and extensive: such a

^t Mills v. Farmer, 1 Meriv. 92.

one was Lord Northington, whose decisions are published by his grandson EDEN. These Reports are characterized for their accuracy and fidelity, and were principally drawn from the manuscripts of Lord Northington himself, which consisted of six volumes of note-books:^u they embrace a period of nine years, *i.e.* from 1757 to 1766, which was the time his Lordship occupied the woolsack. CHAP. I.
Eden.

To Lord Northington succeeded Thurlow as chancellor, whose judicial reputation is well known. The decisions of this eminent judge are, as to the greater part, preserved in BROWN'S REPORTS. These volumes merit the thanks of the profession, for the care and general accuracy which the author has observed in their compilation. Lord Kenyon was Master of the Rolls under Lord Thurlow; and his decisions, as well as those of the lord chancellor during the same period, appear in COX'S CASES IN CHANCERY. Brown.
Cox. These cases, so far as they reach, are intended as a supplement to Brown's Reports, and those of Vesey, junior. Cox has the reputation of being a reporter of brevity, perspicuity, and undoubted fidelity.

The Reports of the younger VESEY (among the most voluminous which at present appear upon the shelves of the Chancery barrister) extend over a considerable space of time: they embrace not only the judgments of Sir Richard Pepper Arden, Master of the Rolls,—the entire number of Lord Loughborough,—but they also continue the decisions of the court far into Lord Eldon's time. These Reports, contained in nineteen octavo volumes, are remarkable for their copiousness and fidelity; although the wary and doubting character of this most distinguished and upright judge (Lord Eldon) has formed the theme of frequent pleasantry and humorous jest; inso-much that the Court of Chancery, while he held the seals, appeared to many a despairing suitor no other than Vesey, jun.

^u *Vide* Pref. to Eden's Reports.

CHAP. I. John Bunyan's renowned Doubting Castle itself. If, however, we take into consideration that the delays then so frequently lamented, arose not from any principle of indolence in the Chancellor, but a rigid and conscientious anxiety to arrive at just conclusions upon every case which came before him, we shall probably find that the general benefit bequeathed to the public by such protracted ponderings on his Lordship's part, far outweighs the inconvenience which private individuals were so frequently called upon to endure; for, whenever a case arose of sufficient novelty or importance to demand the attention of his comprehensive mind, and to call forth his deliberate and well-weighed judgment, it was scarcely anticipated that any chancellor would afterwards venture to call into question, much less to overrule, that judgment, supported, as it would be, by the most profound learning and deep and careful investigation. Thus both the profession and the public felt they had a sufficient guarantee that a judicial sentence of Lord Eldon, when once pronounced, would stand the test of legal scrutiny, and serve as an authority for future judges.

Living
reporters.

It would seem a task of rather too delicate a character to venture an opinion as to the merits of those gentlemen who have carried on the series of decisions in the lord chancellor's court, from the last volume of Vesey, jun., to the present time, except by merely stating that the learning, copiousness, and accuracy of their Reports, have hitherto gained for their authors the well-merited confidence of the legal profession, whether contained in the volumes of Beames, Cooper, Merivale, Swanston, or their successors.* To these must be added the Reports of the Court of Chancery in Ireland, possessing equal

* The whole number of reporters, including Vesey, jun., and those who have succeeded him in the High Court of Chancery,

authority, and no less merit, than those in our English CHAP. I.
courts of equity.

It may, perhaps, be well to remind the student that, ^{Proper} in reading the Reports, he ought to pursue a course ex- ^{method to} ^{be observed} ^{in studying} ^{the Reports.} exactly the reverse in chronological order from that adopted

together with the period over which their Reports extend, is as follows :—

Vesey, jun.,	from 29 to 52 Geo. III.
Ves. and Bea.,	52 to 54 Geo. III.
Cooper (G.),	55 Geo. III.
Merivale,	56 & 57 Geo. III.
Swanston,	58 & 59 Geo. III.
Jacob and Walker,	60 Geo. III. to 1 & 2 Geo. IV.
Jacob,	2 & 3 Geo. IV.
Turner and Russell,	3 to 5 Geo. IV.
Russell,	6 to 9 Geo. IV.
Russell and Mylne,	10 Geo. IV. to 1 & 2 Will. IV.
Mylne and Keen,	3 to 6 Will. IV.
Mylne and Craig,	6 Will. IV. to 4 & 5 Vict.
Craig and Phillips,	4 & 5 Vict.

Lord Chancellor's Court and Court of Appeal in Chancery.

Phillips,	5 to 11 Vict.
Hall and Twells,	12 Vict. 1849, to 13 & 14 Vict. 1850.
Macnaghten and Gordon,	12 Vict. 1849, to 14 & 15 Vict. 1851.
De Gex, Mac., and Gord.,	14 & 15 Vict. 1851.
De Gex and Jones,	1856 to 1859.
De Gex, Fisher, and Jones,	M. T. 1859, to present time.

Rolls Court.

Tamlyn,	9 Geo. IV. 1829, to 1 Will. IV. 1830.
Keen,	6 Will. IV. 1836, to 1 Vict. 1839.
Beavan,	1 Vict. to present time.

Vice-Chancellor of England's Court.

Maddock,	55 Geo. II. 1815, to 1 & 2 Geo. IV. 1822.
Simons and Stuart,	2 Geo. IV. 1822, to 7 Geo. IV. 1826.
Simons,	7 Geo. IV. 1826, to 13 & 14 Vict. 1850.

Vice-Chancellor Cranworth.

Simons, N. S.,	13 & 14 Vict. 1850, to 15 & 16 Vict. 1851.
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CHAP. I. in any other kind of reading; for, commencing with those of recent date, and getting the present law well fastened upon his memory, he should read the decisions upwards, until he has traced the principles and practice

Vice-Chancellor Kindersley.

Simons, vol. xvii.,	1852, 15 & 16 Vict.
Simons, N. S., vol. ii.,	1852, 15 & 16 Vict.
Drewry,	15 & 16 Vict. 1852 to 1859.
Drewry and Smale,	1859 to present time.

Vice-Chancellor Sir James Wigram.

Hare,	5 Vict. 1841, to 12 & 13 Vict. 1850.
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Vice-Chancellor Sir James Lewis Knight Bruce's Court.

Young and Collyer,	5 Vict. M.T. 1841, to 6 & 7 Vict. H.T. 1844.
Collyer,	7 Vict. H.T. 1844, to 9 & 10 Vict. M.T. 1846.
De Gex and Smale,	10 Vict. 1846, to 15 Vict. 1851.
Hare, vol. viii.,	13 & 14 Vict. 1850.

Vice-Chancellor Sir James Parker.

De Gex and Smale, vol. v.,	15 Vict. M.T. 1852, to Trinity Vacation, 16 Vict. 1853.
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Vice-Chancellor Turner.

Hare, vols. ix. and x.,	14 & 15 Vict. 1851, to 15 & 16 Vict. 1852.
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Vice-Chancellor Wood.

Hare, App. to vol. ix.	16 Vict. 1853.
Hare, vol. x.,	15 & 16 Vict. 1852, to 16 & 17 Vict. 1853.
Kay,	16 Vict. 1853, to 17 Vict. 1854.
Kay and Johnson,	17 & 18 Vict. to 21 & 22 Vict.
Johnson,	1858 to 1860.
Johnson and Hemming,	1859 to present time.

Vice-Chancellor Stuart.

Smale and Giffard,	16 Vict. M.T. 1852.
Giffard,	1858 to present time.

To these must be added C. P. Cooper's Rep. "temp. Brougham," 1833-4, and C. P. Cooper's "Points of Practice," 1837-8.

involved in analogous cases to their very source. By these means, he will avoid getting his mind imbued with old law and ancient cases, which have perhaps become obsolete, or for a considerable time have been overruled. CHAP. I.

The character and utility of our Law Reports in general, and the effect which their contents have upon the system of jurisprudence in England, cannot be given in a more glowing and masterly style than in the words of the distinguished individual whose commentaries above referred to have gained him a name, not only among our transatlantic brethren, but in our own country also, as a lawyer of no ordinary merit. "The old cases," says he, "prior to the year 1688, need only be occasionally consulted, and the leading decisions in them examined: some of them, however, are to be deeply explored and studied; and particularly those cases and decisions which have spread their influence far and wide, and established principles which lie at the foundations of English jurisprudence. Such cases have stood the scrutiny of contemporary judges, and have been illustrated by succeeding artists, and are destined to guide and control the most distant posterity. The reports of cases since the middle of the last century ought, in most instances, to be read in course, and they will conduct the student over an immense field of forensic discussion: they contain that great body of the commercial law, and the law of contracts and of trusts, which govern at this day: they are worthy of being studied, even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law Reports are dramatic in their plan and structure; they abound in pathetic incident and displays of deep feeling: they are faithful records of those 'little competitions, factions, and debates of mankind,' that fill

Prof. Kent's
character
of the said
Reports.

CHAP. I. — up the principal drama of human life, and which are engendered by the love of power, the appetite of wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud: they give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom: they become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law. We should have known but very little of the great mind and varied accomplishments of Lord Mansfield, if we had not been possessed of the faithful reports of his decisions: it is there that his title to the character of ‘founder of the commercial law of England’ is verified. A like value may be attributed to the reports of the decisions of Holt, Hardwicke, Willes, Wilmot, De Grey, Camden, Thurlow, Kenyon, Sir William Scott, and many other illustrious names, which will be as immortal as the English law. Nor is it to be overlooked, as a matter of minor importance, that the judicial tribunals have been almost uniformly distinguished for their immaculate purity. Every person well acquainted with the contents of the English Reports must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and fall on judicial history, down from the first page in Drew to the last page of the last reporter, we should find the higher courts of civil judicature generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees.”

CHAPTER II.

GENERAL OBSERVATIONS ON EQUITY.

EQUITY is defined by St. Germaine to be “a right wisenes Equity: definition of. that considereth all the perticuler circumstances of the deede, the which also is tempered with the sweteness of mercy; and such an equitie must always be observed in every law of man, and in every general rule thereof, to temper and mitigate the law.”^a But, whatever may have been the notions of former ages respecting the powers of an equitable judge, in deciding according to the dictates of his own conscience, as to what he conceived to be reasonable and just, it is certain that the rules of equity, as observed in the administration of justice in the Court of Chancery in more modern times, are not left to the arbitrary opinions of its presiding judges, but are governed by a system of tried, fixed, and well-grounded principles.

Equity, as administered in our courts of chancery, is no more than such a measure of justice as would be afforded in our courts of common law, were it not from their imperfect manner of giving redress. The constitution and machinery of those courts having been formed in a rude unpolished era—however well adapted to meet the exigencies of that period—were by no means adequate to afford relief in all the varied and multiplied cases What is equity as administered in the Courts of Chancery.

^a Doc. and Stu. Dia. 1, ch. 16, ed. 1580.

CHAP. II. which a more refined and artificial age has introduced ; for example, in the specific performance of contracts, a court of law, although it acknowledges the mutual *right* of the contracting parties to a performance in specie, is nevertheless inadequate to afford a complete remedy. "I can easily understand," said his Honour the Vice-Chancellor of England,^b "that this court might have assumed a larger jurisdiction than the courts of common law, as it has often taken the lead, and suggested to the legislature what ought to be done. As, for instance, in cases of set-off, and of landlords taking advantage of breaches of covenants for payment of rent, this court did interfere long before there was any statutory interference."

General
description
of a court
of equity.

"The most general, if not the most precise, description of a court of equity is, that it has jurisdiction in cases of rights recognized and protected by the municipal jurisdiction, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain ; for if it be doubtful and obscure at law, equity will assert a jurisdiction : it must be adequate ; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity : and it must be complete ; that is, it must attain the full end and justice of the case : it must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in the future ; otherwise equity will interfere, and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is therefore sometimes concurrent with the jurisdiction of a court of law ; it is sometimes exclusive of it ; and it is sometimes auxiliary to it."^c

Origin of
the common
law courts.

Our courts of common law, as they appear to have

^b Jones v. Roberts, 8 Sim. 403.

^c 1 Story's Eq. Jur. ; 1 Fonbl. c. 1, s. 1-3, ch. 1, s. 33.

grown out of universal consent and immemorial usage, are based upon such principles of reason as would afford a remedy in every instance of injury or fraud; but, as before observed, they lack those means which a court of equity possesses, and which is therefore resorted to for the purpose of carrying out the intention of the common law; and thus we find, that whenever relief may be had at law, the suitor is driven to seek it in an ordinary court of judicature, unless where it happens that the courts of law and equity have a concurrent jurisdiction. "There is," said Lord Tenterden,^d "a great objection to courts of law taking upon themselves to act as a court of equity; because they have not the means of doing that full and ample justice which the particular case may require."

Some writers have defined equity to be the supplement of a defective law, deciding according to the will or supposed intention of the lawgiver, which he was not able, or not willing, to express. Aristotle calls it a species of justice distinct from what is written; which may happen either contrary to the design and inclination of the lawgiver, or with his consent: in the former instance, where a number of particular facts may escape his knowledge; in the other, when he perhaps may be conscious thereof, but, on account of their variety, he is not willing to enumerate them:^e so, in the civil law, "in omnibus quidem, maxime tamen in jure, æquitas spectanda est."^f In what that equity consisted, and the action by which it was sought to be obtained, it was left for the prætor to decide, where the law itself to which it had reference existed; for, in regard to the Lex Aquilia, it is said, "eas actiones quæ legibus proditæ sunt, si lex justa et necessaria sit, supplet prætor in eo quod legi deest."^g

Definition
of equity.

Aristotle.

In a speech delivered by King James in the Star K. James.

^d Townson v. Green, 2 Car. and Pa. 111.

^e Arist., 1 Rhet. 14.

^f D. 50, 17, 19.

^g D. 19, 5, 11.

CHAP. II. Chamber, upon the subject of the law and courts of justice, on the 20th of June, 1616—part of which is extracted by Mr. Saunders, Ord. Ch. p. 10—we have the following:—"Then there is a Chancery Court: that is a court of equitie; and hath power to deale likewise in civill causes. It is called a dispenser of the king's conscience; following always the intention of law and justice: not altering the law,—not making that blacke which other courts make white, nor *è converso*; but in this it exceeds other courts, mixing mercie with justice, when other courts proceed only according to the strict rules of law; and where the rigour of the law in many cases will undoe a subject, there the Chancery tempers the law with equitie, and so mixeth mercie with justice, as it preserves men from destruction. And thus, as I before told you, is the king's throne established by mercie and justice.* The Chancery is independent of any other court, and is onely under the king. There it is written, *teste me ipso*; from that court there is no appeale.† And, as I am bound in my conscience to maintain every court's jurisdiction, so especially this, and not suffer it to sustaine wrong; yet so to maintaine it as to keep it within its owne limits, and free from corruption."

* This appears to have been a favourite idea of King James, and which he took no little pains, and lost no opportunity, to impress upon his subjects; for, in the bill of pardon to the Countess of Somerset (formerly Countess of Essex), as accessary before the fact to the imprisonment and death of Sir Thomas Overbury, he reminds the public that he is the source from which the fountains as well of mercy as justice are wont to flow:—"Cum tam justitia quam misericordia fontes a solio regis promanare consueverint," etc.—Narrative History of King James for the first Fourteen Years.

† The jurisdiction of the House of Lords was of subsequent date. Prior to that, the appeal lay only to the king himself (*vide ante*). It is probable that the appeal from the chancellor to the Upper House first arose in the early part of the reign of Charles I.—Sir Matt. Hale's Jurisdic. of the House of Lords, ch. 32.

The aid of our courts of equity may also be obtained to enforce the judgment of a court of ordinary jurisdiction: and thus, when a plaintiff at law has proceeded to execution upon an *elegit* or *fiери facias*, which several writs are defeated by a prior title, either obtained by fraud, or which does not extend to the whole interest of the debtor in the property upon which the judgment is intended to be executed, he may file a bill to obtain the execution of the *elegit* or *fiери facias*; but in either of these cases it is incumbent upon the plaintiff to prove that he has proceeded at law as far as he is able to perfect his title, otherwise a demurrer will be allowed. Therefore it is necessary for the plaintiff to show that he has sued out his writ, the execution of which is avoided; and, notwithstanding the opinion of many that the plaintiff need not procure a return of the writ,^h yet it was otherwise determined by Lord Nottingham,ⁱ who held that a return was necessary. In the case of *Neate v. Duke of Marlborough*,^j it was decided that a judgment creditor, who desires to enforce his security against his debtor's equitable interest in freehold estates by a bill in equity, must previously sue out an *elegit* against such estate; and further, that if his bill do not allege that he has done so, the defendant may demur. But equity will not control the ordinary courts of jurisdiction, in direct opposition to a plain and well established rule of law, unless there be some particular circumstances attending the transaction which the suitor could not avail himself of at law, but which in conscience ought to be respected: for then, agreeably to its own principles, it proceeds upon the ground, that the rules of law are not appli-

CHAP. II.

A court of equity, when used to enforce a judgment at law.

Cases in which the court will not interfere to control the ordinary courts.

^h *King v. Marissal*, 3 Atk. 192, Mitf. Pl.

ⁱ *Cited arguo*. *Balch v. Westall*, 1 P. Wms. 445. *Vide Adams*, 129-30.

^j *Cuddon v. Herbert*, 7 Sim. 485, 3 My. and Cra.

CHAP. II. cable to, or framed to meet, the exigencies of such a case. "The Court of Chancery," said one of the judges, in the case of *Bath v. Montague*, 3 Ch. Cas. 67, "may do great things; but it cannot alter things or make them operate contrary to their essential natures and properties." Thus it is fully settled, that a lessee is liable on his covenant to pay rent, although the premises may have been destroyed by fire, or any other accident:^k from such a covenant he has no escape, either at law or in equity; but if the lessor covenant to rebuild the premises demised, in the event of their being burnt down, a court of law, not being able in an action for rent to take notice of this covenant, it might be within the province of a court of equity to restrain the lessor from proceeding in his action,—it being against conscience to insist on the benefit of a covenant which was induced by another covenant (*i.e.* the rebuilding in case of fire) which the lessor refuses or neglects to perform.^l But a tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain him from suing for the rent until the premises are rebuilt.^m

Several degrees of relationship between the equity and common law jurisdiction.

Concurrent jurisdiction.

The jurisdiction of the Court of Chancery is sometimes concurrent with the jurisdiction of the courts of common law, sometimes exclusive or independent of it, and sometimes auxiliary to it.ⁿ

The courts of law and equity have a concurrent jurisdiction over several matters which from the greater con-

^k *Compton v. Allan*, 6 T. R. 650.

^l 1 Fonbl. Eq. 378, 5th ed. See the relief now afforded by a court of equity to lessees, and their breaches of covenant in certain cases (22 & 23 Vict. c. 35, s. 4).

^m *Leeds v. Cheetham*, 1 Sim. 146.

ⁿ 1 Stor. Eq. Juris. Introd.; Fon. Tr. Eq. b. i. c. 1, s. 3.

venience of furnishing a more complete remedy, have by degrees fallen almost entirely within the province of the equity department; and it appears to be a well established doctrine of modern times, that civil fraud is cognizable by the Court of Chancery to reinstate the party defrauded, although also punishable at the common law or by statute;^o for notwithstanding many of these cases are remediable at law, yet courts of law not having (until recently by the 14 & 15 Vict. c. 99 and 16 & 17 Vict. c. 83) power to examine the defendant upon oath, many of those cases would utterly fail of redress for want of obtaining proof from the only party capable of giving it.

Thus over cases of *Fraud* a concurrent jurisdiction is *Fraud.* maintained by the courts of equity and of common law, as where an illiterate person has been defrauded of his property by means of a deed having been falsely read over to him by the grantee or by a stranger. In such a case the deed may be avoided either at law or in equity.^p Also in matters of *Account*, the remedy was by action of *Account.* account before auditors, which was introduced about the reign of Henry III.^q Originally bailiffs or receivers only, and also guardians in socage, could be charged in account; but this rule was for the benefit of trade and commerce, and extended to cases between one merchant and another.^r However, in process of time, the Court of Chancery, from its peculiar adaptation in taking accounts in the proper office (formerly the master's office), together with its power of examining upon oath, or in other words, of drawing out the proper proofs from the party's own conscience, which, until the above-mentioned

^o *Bright v. Eynon*, 1 Burr. 390; *Colt v. Wollaston*, 2 P. Wms. 156.

^p 1 Fonbl. Tr. on Eq. b. i. c. 1, s. 3, note (f); *Thoroughgood's case*, 2 Co. Rep. 9 a, p. 444.

^q Bac. Abr. tit. "accompt."

^r 1 Inst. 372 a; 11 Co. Rep. 89; *Crompt. on Courts*, p. 49.

CHAP. II. Act, a court of law was incapable of doing; in respect to documents, etc.,^s together with other peculiarities incident to the court having been more generally resorted to as the best and readiest means of enforcing and settling long and complicated accounts, the action of account gradually fell into disuse, and the Court of Chancery is now almost invariably the only tribunal applied to for that purpose, notwithstanding the modern doctrine laid down by L. C. B. Alexander, in *Frutas v. Das Santos*,^t namely, that in order to induce a court of equity to interfere in ordinary cases of account, they must be such as cannot possibly be justly and fairly taken in a court of law. Prior also to the Acts of Parliament "allowing a court of law to adjudicate upon an adverse independent claim, for the sake of giving the claimant the benefit of it by way of set-off," the Court of Chancery was the only tribunal for the adjustment of mutual demands between parties, where at law those mutual debts and credits would be the subject of cross-actions, and not of account. The above Acts however give a court of law, in matters of *set-off*, a concurrent jurisdiction with the courts of equity.

Dower.

In the case of *Dower*, a concurrent jurisdiction existed also between the courts of law and equity, and the action by writ of right of dower and dower *unde nihil habet*, as hereafter mentioned,^v were two of the real actions allowed to exist after the passing of the 3 & 4 Will. IV. c. 27, s. 36, abolishing real actions generally. The earliest bill in Chancery on record, appears to have been in the time of Henry VI., when the ground of the widow's application was her helplessness and poverty.^w So long as this was

^s 1 Stor. Eq. Jur. ch. viii. s. 462, 6th ed.

^t 1 Y. and Jew. 576.

^u 2 Geo. II. c. 22, s. 13; 8 Geo. II. ch. 24, s. 3.

^v *Infra*, p. 72 (n).

^w Spence, Eq. Jur. 653.

the only reason for applying to the Court of Chancery in case of dower, that court was probably but little resorted to; but when afterwards the full efficiency of the proceedings in this court, in affording a more perfect and satisfactory remedy, became better known and appreciated, namely, in ascertaining upon what estates the dower attached, their relative value, etc., without reference to the widow's poverty, the jurisdiction of this court became gradually and by slow degrees established. This jurisdiction was not therefore recognized in its fullest measure until comparatively modern times, owing to the cautious manner in which the power was conceded, and the doubts that formerly existed as to the extent of its jurisdiction.*

Among other subjects upon which this concurrent jurisdiction was exercised, were reckoned *Tithes*. The circumstance of the clergy, in former times, resorting to the Court of Chancery for the payment of tithes and other ecclesiastical dues, on account of the defective power of the ecclesiastical courts to afford a remedy, appears to be but natural; the principal officers of that court being civilians and better conversant with the affairs of the Church than the common-law officers. And notwithstanding it had formerly been a disputed fact whether a custom or *modus decimandi* could be the subject of a Court of Chancery, yet it afterwards became fully settled that this latter tribunal had an inherent power of establishing moduses between parishioners, against the parson, patron, or ordinary.^y This jurisdiction of the court continued to be generally exercised from the reign of Elizabeth (the time when it became completely acknow-

* Choice Cas. in Ch. p. 149; Wallis v. Everard, 3 Ch. Rep. 87; Curtis v. Curtis, 2 Bro. C. Rep. 634; 1 Fonbl. Tr. Eq. b. i. c. 1, s. 3.

^y Toth. p. 282; Mitf. Pl.

CHAP. II. — ledged), until the recent Tithe Commutation Act, 2 & 3 Will. IV. c. 100, which has the effect of almost depriving the court of this branch of its jurisdiction.

Partition.

In the case of *Partition*, there was originally but one means of settling the rights between coparceners and joint owners of estates, namely, the writ of partition, which was directed to the sheriff, ordering him by the assistance of a jury to ascertain the several shares, and then to assign to each owner his share accordingly. The greater convenience however of the Court of Chancery, by means of the bill of partition, in giving a more satisfactory adjustment of the several rights of co-owners, made that court the principal place of resort in all cases requiring a partition of estates or other kinds of property. This concurrent jurisdiction began to be recognized about the time of Elizabeth; and the greater facilities which the court afforded in giving a more complete and satisfactory remedy by means of its commissioners for making partition and compelling parties to convey to each other their respective portions in severalty, so far established it as a concurrent jurisdiction with courts of law, that an application to the latter tribunal became of very rare occurrence, insomuch that in subsequent times its jurisdiction was rendered almost obsolete, when the writ of partition was finally abolished by the before-mentioned statute, 3 & 4. Will. IV. c. 27, s. 36, among the rest of the real actions which were thereby put an end to. The remedy at law being thus taken away, the jurisdiction of the Chancery Court is no longer concurrent with but independent of courts of law.

Although a court of equity may seem to entertain an almost exclusive jurisdiction in matters of *accident*; yet there are some cases in which a remedy may also be had at law, namely the loss of deeds, mistakes in accounts

or receipts, wrong payments, deaths which render it impossible to perform a condition literally, etc.^z CHAP. II.

There are also certain species of *Trusts*, which fall within the jurisdiction of a court of common law, although generally speaking trusts are perfectly cognizable in equity, as deposits and all kinds of bailments, etc., for which the former tribunal will furnish a remedy.^a

The instances wherein equity exercises a jurisdiction independently of the courts of law, are matters of trust, and now, since the 3 & 4 Will. IV. c. 27, s. 36, of partition between coparceners, etc. And in those cases Independent jurisdiction. Trusts. where the claims of substantial and universal justice entitle the claimant to relief, but the courts of ordinary jurisdiction are deficient in furnishing a remedy, instances of the third department of equitable jurisdiction, namely, wherein it exercises its functions as auxiliary to the courts of common law, are as follow:—first, the court of equity acts as auxiliary to the ordinary courts of jurisdiction, where any legal impediment would otherwise be set up against the fair determination of a question depending in a court of law, and thus it will prevent any person, such as a trustee, lessee, or mortgagee having a term of years in possession, from setting up the title against an ejectment, to try a right to land;^b secondly, it will compel a discovery which may assist in the administration of justice in a court of law; thirdly, it enables a plaintiff to perpetuate the testimony of witnesses, when there appears a well grounded apprehension that the evidence is such as is material, and likely to be lost by the Auxiliary jurisdiction.

^z 3 Bl. Com. 431; 1 Stor. Eq. Jur. c. iii.; Mitf. Pl.; 1 Fonbl. Tr. on Eq. b. i. c. 1, s. 3, note (f).

^a 3 Bl. 432; 1 Stor. Eq. Jur. p. 54, s. 60; also 21 & 22 Vict. c. 27, which gives a power to a court of equity to award damages in certain cases.

^b Harris v. Southcote, 1 Atk. 540.

CHAP. II. death or departure from the realm of the only witnesses to the subject-matter of dispute;^c and fourthly, by giving effect to a judgment pronounced in a court of law. It will also protect property pending litigation, by either ordering it to be brought into court, or appointing a receiver to collect the rents of real estates, and the interest of personal property under the control of the court. It will also restrain vexatious litigation in cases where a multitude of actions of precisely the same character may be prosecuted *in infinitum* at law.^d

General
objects of a
court of
equity.

The general objects which our courts of equity may be called upon to redress, and which have in some measure been anticipated in the immediately foregoing pages, are,—1st. When the principles of the courts of ordinary jurisdiction acknowledge a right, but their inherent powers are too limited to afford a complete remedy. As where an instrument upon which a legal title is founded has been lost or burnt, and for this reason a court of common law can take no cognizance thereof, equity will, upon an affidavit of such loss or destruction made by the party seeking relief, supply the defect; for “*nullus recedat a curiâ cancellariæ sine remedio*,”^e is an injunction of very ancient date. Also, where a person is injured by the non-fulfilment of an agreement, and cannot have sufficient justice in a court of ordinary jurisdiction, which only gives damages for a breach of the contract, equity will afford its aid, and compel a specific performance.* 2. Where the courts of common law, (which can only look at the instru-

^c Philips v. Carew, 1 P. Wms. 117.

^d 1 Fonbl. Tr. Eq. b. 1. c. 1, s. 3; 3 Bl. Com.

^e Per Arch. Morton, C., Y.B. tem. 4 Henry VII. fo. 5. Vide Spence, Eq. Juris. 578 (a).

* The common law courts may now decree the specific performance of any duty of a public nature in which the plaintiff is personally interested.

ment itself, and not the means whereby it has been obtained,) are likely to become the medium of injustice by allowing a party to sue on a bond or note, which has been acquired by fraud or undue influence. In such a case, a court of equity assumes a jurisdiction of restraining proceedings at law, until the circumstances attending the transaction have been thoroughly sifted; and if upon investigation it be proved that the instrument which formed the ground of action was improperly acquired, or in a manner against conscience, the court will order it to be delivered up to be cancelled, and will, as far as possible, place the parties in the same situation in which they stood before. 3. Equity will assist in matters wherein the courts of ordinary jurisdiction are silent, but the principles of universal justice require the interference of the judicial power, as in the case of trusts, which, however a man is bound *in foro conscientiae* * to perform, were, nevertheless, unknown to the common law, and therefore the Court of Chancery, as the supreme court of conscience, very early took cognizance of them, by holding a party clothed with the character of trustee to a strict performance of his fiduciary obligation. Although there are certain trusts cognizable in a court of law, as deposits and all manner of bailments, and also that implied contract—namely, of having undertaken to account for money received to another's use

* From what has been before observed, it will be seen that equity formed a considerable ingredient in the Roman law, and was not wholly unknown to the common law; but it would seem that *conscience*, as a principle of judicial decision, was of a purely clerical introduction, and incident to their office as spiritual arbitrators of a man's conscience; and it comprehended those moral obligations which resulted from a person being placed in any situation as regards another that would give to the one a right to expect, on the part of the other, the exercise of good faith towards him, nearly resembling the *bona fides* so prominently exhibited in the prætorian code.—Spence, Eq. Juris. 411.

CHAP. II. which is the foundation to an action on the case, almost as universally remedial as a bill in equity.^f 4. To remove impediments tending to frustrate the fair determination of a question in courts of common law; and equity will for this purpose prevent the adverse party in an action of ejectment from setting up terms, etc., unless such party be a purchaser for a valuable consideration, and without notice of the claimant's title. 5. To protect property from being dissipated or wasted, pending the litigation of a question respecting it in any other court of judicature, and will thus enjoin a tenant in possession from committing waste upon an estate which forms the subject of dispute in a court of law. 6. To restrain the setting up claims of a doubtful nature, by one party, which may in its results lead to an incalculable injury towards another; thus, for example, in the common case of the infringement of patents, or the publication of books, where the copyright is in the plaintiff, equity will grant an injunction until the question of right can be settled. 7. To prevent a third party from being injured at law, through the doubtful title of others claiming the same object, by compelling such rival claimants to determine their rights by interpleading. 8. To put a bound to vexatious litigation, and to a multiplicity of suits in cases where the courts of ordinary jurisdiction allow of frequent actions concerning the same questions. Thus, where an action of ejectment has been brought to try the title of property in a court of common law, (the judgments of such courts not being conclusive,) equity will, after repeated trials, interpose by a perpetual injunction, and prevent further litigation in the matter. So when one general right is attempted to be established against several distinct persons, the courts of equity, to prevent a multiplicity of suits, will allow a single bill to be filed for the sake of

^f 4 Steph. Bl. Comm. 4.

determining the right against the several defendants. CHAP. II.

9. To further the ends of justice, the Court of Chancery will sometimes act as ancillary to other courts, and aid them by compelling a discovery of certain matters essential to the fair trial of the question before them. And, lastly, when the testimony of witnesses is in danger of being lost through the infirmities of age, or other accidents, equity will lend its assistance to perpetuate such testimony, for the purpose of its being afterwards used as evidence in other courts.^g

The jurisdiction of the Court of Chancery comprises various branches wherein its authority is exercised. The most important one which, as a court of equity, it exercises, is denominated its extraordinary jurisdiction in contradistinction to its ordinary jurisdiction.

Various
branches of
the Court of
Chancery.

^g Mitf. *passim*.

CHAPTER III.

THE VARIOUS BRANCHES OF THE COURT OF CHANCERY.

EVERY matter determinable by the chancellor in the Court of Chancery may be classed under one or the other of the following heads:—1, The common law jurisdiction; 2, The statutory jurisdiction; 3, The specially delegated jurisdiction; 4, The equity jurisdiction.* The latter jurisdiction is the most important, and more in unison

* Sir Matthew Hale divides the Court of Chancery into two branches:—I. The equitable, or English, jurisdiction,—although anciently no such thing was known, but its origin, or at any rate its enlargement, might have arisen from two circumstances; first, the usual committing particular petitions in Parliament, not then determined, unto the determination of the chancellor; secondly, by the invention of uses, which were frequent and necessary, especially in times of dissension touching the Crown (p. 46). II. The legal, or Latin, jurisdiction. Under the latter they proceeded against officers of the Court of Chancery by bill, or, on behalf of them, by writ of privilege, until the parties come to issue, and then it is sent into the King's Bench to be tried, and there also judgment is given without remanding it to the Chancery. 2. *Scire facias*.—The king's interest, *e. g.*, the king's right to wards (before the erection of the Court of Wards), and partitions thereupon made, or dower claimed of the wards' land in Chancery, petitions of right, *monstrans* of right, traverses of right, *rege inconsulto*.—Jurisd. of the Lords' House of Parliament, ch. vi.

In such and the like cases, the tituling or state of the Record in Chancery was sometimes *placita in Cancellariâ*, sometimes *placita*

with the principles which gave rise to the establishment of such a court as the Court of Chancery. CHAP. III.

I. By the COMMON LAW the chancellor is invested with various powers. He is privy councillor, and speaker of the House of Lords; he exercises patronage over all the king's livings under the value of twenty marks a year in the king's books;^a he is conservator of the peace, and has the right of appointing justices of the peace throughout the kingdom.^b It is the duty of the chancellor to summon Parliament, by issuing his writs; whilst all Acts of Parliament are enrolled and deposited in Chancery.

Common-law power of the chancellor.

Those branches of the common law jurisdiction of the Court of Chancery which have been made the subject of discussion in the Court, relating chiefly to its ministerial offices, and the privileges of its officers, are generally considered under three heads:—

1. The nomination, etc., of the officers of the court; such as the masters in chancery, and cursitors, who are nominated, admitted, and sworn by the chancellor.

2. Proceedings in the Petty Bag Office; where the chancellor holds pleas of *scire facias* to repeal the king's letters-patent, and on petitions of right *monstrans de droit*, traverses of office, *scire facias* upon recognizances, executions upon statutes, etc., which being registered in this court, the process issued out of the same is made returnable there, and entered in the office denominated the Petty Bag. In this court, also, may be brought any personal action by or against any officer of the Court of Chancery, in respect of his service or attendance.^c

Proceedings in the Petty Bag Office.

coram Rege in Cancellariâ. In this manner, the *Concilium Regis* became intermingled with the Court of Chancery, and derived even the very name of *Concilium Regis* from it,—though, for the most part, with the addition of *Concilium Regis in Cancellariâ*.—Ibid. p. 50.

^a 38 Edw. III. c. 3; 13 Edw. IV. c. 3; and Hen. IV. c. 80.

^b 3 Bl. Comm. 48; Lambard's Just. 28.

^c Madd. Ch. P. v. 1. 5, 3rd ed.

CHAP. III.

3. The ordering of writs to be made out by the cursitors. The chancellor, by the common law, has the power of issuing all *original writs*, which are returnable into the Queen's Bench or Common Pleas: if returnable in the latter, the original writ may relate to actions *real* or *personal*. The writs^d returnable in the Queen's Bench were,^e—1, *Assizes de novel disseisin*; 2, Writs founded upon a supposed personal wrong or force, such as *trespass vi et armis*, *ejectiones custodiæ*, *ravishment of ward*, *ejectione firmæ vi laicæ*; 3, Writs or suits on behalf of the king; 4, *Writs of quare impedit*, *quare non admisit*, etc.; 5, Writs of replevin; 6, Actions of conspiracy, actions upon the case, and all writs in personal actions, except account, covenant, debt, detinue, and sometimes writs of annuity.*

II. Under THE STATUTORY JURISDICTION, or that jurisdiction which is derived entirely from Acts of Parliament,

^d The stat. 2 Will. IV., usually called the "Uniformity of Process Act," virtually annulled all original writs in personal actions.

^e See 3 & 4 Will. IV. c. 27, s. 36.

* The Court was occasionally employed, by a species of collateral jurisdiction, in deciding upon questions, covenants, and agreements, grants of incorporeal hereditaments, releases of right, and declaration of uses, which were entered on the close rolls, and it became the practice to secure the performance of those deeds by recognizance acknowledged in chancery.—Palg. Counc.

By the 3 & 4 Will. IV. c. 27, all real and mixed actions are abolished, except a writ of right of dower, or writ of dower *unde nihil habet* (which includes a plaint for freebench), or a *quare impedit*, or an ejectment, and no other action, real or mixed, might be brought after the 31st day of December, 1834, and even these last relics of an antiquated procedure were not long permitted to survive their former contemporary writs, for by the 23 & 24 Vict. c. 126, s. 26, no writ of dower, writ of right of dower *unde nihil habet*, and no plaint for freebench, or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of the Act; but where such writ, etc., would now lie, an action may be commenced by writ of summons issuing out of the Court of Common

were, till very recently, comprehended the *Court of Delegates*, a *Commission of Review*, and *Bankruptcy*. CHAP. III.

Until 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41,—which remove the jurisdiction of the Court of Delegates to the Privy Council,—that Court was the great court of appeal in all ecclesiastical matters, wherein the judges, being composed of lords spiritual and temporal, judges of the court at Westminster, and doctors of the civil law, were appointed by the king's commission under the great seal, and issuing out of Chancery, to represent his person, and to hear all appeals made to him under and by virtue of statute 25 Henry VIII. c. 19, instead of appealing to the Pope, as was the case in all questions arising out of the canon or ecclesiastical law, or when persons had felt themselves aggrieved by a sentence in the ecclesiastical court; which practice of appealing to the Papal chair continued, more or less, from the reign of King Stephen until the passing of the above statute, when the ecclesiastical jurisdiction of the Pope was transferred to the king, as head of the church.^f Court of Delegates.

A *Commission of Review* (which was also repealed by the above statute, 2 & 3 Will. IV.) was only granted by the king in very special cases, to revise the sentence of the Court of Delegates; as no appeal lay from that Court to the House of Lords. This authority was annexed to the crown by the same statute of Henry VIII., when the Commission of Review.

Pleas in the same manner as the writ of summons in an ordinary action; and see the 15 & 16 Vict. c. 76, for the manner in which proceedings in ejectment are now conducted.

It may also be interesting for the reader to be informed that the last writ of right ever to be tried—and which had commenced before the year 1834—was determined in the Common Pleas on Thursday, December 17th, 1846, at Westminster, before Mr. Justice Coltman and Mr. Justice Maule, and the knights attending on the Grand Assize.—*Davies v. Lowndes*, Law Times, viii. 242.

^f 3 Bl. 66; 2 Madd. 586.

CHAP. III. church made an exchange of heads—the Pope having in like manner received the right of granting such commission of review.

Bankruptcy. *Bankruptcy* was another branch of the lord chancellor's jurisdiction, derived solely from the legislature, as by the common law the term *bankrupt* is unknown; although the *cessio bonorum* of the civil law,^g by which a man surrendered all his goods to be divided among his creditors, might have been, and doubtless was, some guide to the legislators in framing their first acts upon bankruptcy.

34 & 35
Henry VIII.
as to
bankrupts.

The first statutes concerning bankrupts were 34 & 35 Henry VIII. c. 4, and 13 Eliz. c. 7; and as trade and commerce continued to flourish in England, it was found expedient to amend the laws of bankrupts; and thus statute after statute was passed, upon which the whole system of our bankruptcy laws was erected, and which formed such an important and extensive branch of the chancellor's jurisdiction, until the 6 Geo. IV. c. 16, "An Act to amend the laws relating to bankrupts." This Act was altered and amended by several others, one of which was the 1 & 2 Will. IV. c. 56; whereby the jurisdiction formerly exercised by the person holding the great seal in bankruptcy was, except in cases of appeal, transferred to a distinct tribunal styled a Court of Review. This was followed by 3 & 4 Will. IV. c. 47, 1 & 2 Vict. c. 110, 2 Vict. c. 11, 2 & 3 Vict. c. 29; and then came 5 & 6 Vict. c. 122, by which county commissioners were appointed; each one of whom constitutes, for a particular district, a permanent Court of Bankruptcy, under the authority of which fiats are issued against traders in that district. The entire law relating to bankruptcy was afterwards comprised in the 12 & 13 Vict. c. 106, known as the "Bankrupt Law Consolidation Act, 1849," which, with the exception of some alterations pointed out in the

^g Inst. L. 4, t. 6, s. 40.

schedule thereto, repealed all the previous Acts. Its general object was to amend and consolidate the laws relating to bankrupts. In addition to all these Acts, however, may be mentioned a more recent one containing but a few sections. This Act, the 17 & 18 Vict. c. 119, August, 1854, was passed "To regulate appointments to offices in the Court of Bankruptcy, and for amending the laws relating to bankrupts." Under its provisions an act of bankruptcy might be committed by merely filing in the court of bankruptcy of the district within which a trader may have resided or carried on business for the last six calendar months, a formal declaration, signed by the trader and attested by an attorney or solicitor, that he is unable to meet his engagements (ss. 16, 17); provided a petition for adjudication of bankruptcy be filed within two calendar months (12 & 13 Vict. c. 106, s. 70). A petition for adjudication might therefore have been filed by any trader against himself (id. s. 89); provided he made it appear to the satisfaction of the court, that his available estate was sufficient to produce the sum of £150 at the least, otherwise his petition would be ordered to be dismissed.

There have also been several Acts passed within the last few years relating to *insolvents*; these Acts having for their object the distribution of the estates of persons who might not have fallen under the denomination of *traders*, and were not, therefore, within the scope of the bankrupt laws: for the latter, being unknown to the common law, and purely of a statutory origin, and more confined in their operation, do not come so near the *cessio bonorum* of the Roman law as the law relating to insolvent persons; for a bankrupt, by his certificate, becomes discharged from all his debts provable under the fiat 5 & 6 Vict. c. 122, whereas an insolvent was never, until the recent Act of 1861, discharged from liability until all his

CHAP. III. debts were satisfied. This was the condition of the insolvent debtor by the Roman law, whose future effects, even after cessation, were liable to his creditors.^h

Various Acts of Parliament have been passed during the last five-and-twenty years, relating to the persons and the estates of insolvent debtors, not being traders; for vesting their estates in an official assignee, in like manner as official assignees held the estates of bankrupts; to assimilate the provisions respecting insolvency to the laws of bankruptcy; to enable certain insolvents, not being traders, to present a petition to the Court of Bankruptcy; to protect them from arrest, and above all to ensure privacy in the proceedings by avoiding public or advertised meetings of creditors, and instead of an assignee that trustees should be appointed by the parties to administer the estate under the control of the Court.ⁱ

But as it was still deemed expedient to further amend the laws of bankruptcy and insolvency, the Act 24 & 25 Vict. c. 134 was passed, which by the last section of the Act, is directed to be construed together with so much of "The Bankrupt Law Consolidation Act, 1849," and "The Bankruptcy Act, 1854," as remain unrepealed, as one Act, to be cited for all purposes as the "Bankrupt Act of 1861."

As it would be inconsistent with the nature of this work to give the provisions of the Act in detail, and which can only be acquired by a reference to the Act itself, it will be sufficient to state that one of its many objects is to abolish the distinction between the laws relating to bankrupts and insolvents, by making them subject to one jurisdiction, called the Court of Bankruptcy; so that under the present Act all persons, whether traders or

^h Dig. L. 42. 3. 4; Cod. L. 7, tit. 71. See *post*, 5 & 6 Vict. c. 116, s. 9.

ⁱ 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 7 & 8 Vict. c. 70; 7 & 8 Vict. c. 96; and 8 & 9 Vict. c. 127.

non-traders, may by a similar process, except in certain minor matters of detail, be made bankrupts, and after the bankrupt shall have passed his last examination, the Court may grant him an order of discharge, which shall have the effect, whether the bankrupt shall have been a trader or not, of discharging him from all debts, claims, or demands provable under his bankruptcy, save as therein otherwise provided (s. 161). CHAP. III.

Provision is also made for a debtor to obtain by petition on oath of the petitioner, an adjudication of bankruptcy against himself, and the filing such petition is to be deemed an act of bankruptcy, without any previous declaration of insolvency by such debtor (ss. 86, 87).

When such petitioning debtor knows the debts justly due and provable under the bankruptcy to amount in the whole to a sum not exceeding £300, such fact must be stated on oath, and if he resides within the Metropolitan District, he must file his petition in the London Court of Bankruptcy, and if he shall not be resident in the Metropolitan District, he shall file his petition in the County Court for the District in which he shall have resided for the last six months next before the filing of his petition, unless he is in custody (s. 94).

The provisions of the 1 & 2 Vict. c. 110, so far as they relate to orders of the Lord Chancellor or of the Court of Review, shall extend and be applicable to orders of the Lord Chancellor and of the Court of Appeal in Chancery sitting in Bankruptcy under this Act (s. 214).

In addition to these several Acts relating to bankruptcy and insolvency, it may be sufficient to mention the 7 & 8 Vict. c. 111. 7 & 8 Vict.
c. 111.
 Vict. c. 111, "An Act for facilitating the winding-up the affairs of joint-stock companies unable to meet their pecuniary engagements." "The object which it has in view," says Mr. Flather, "is fully stated in its title,—viz. to facilitate the winding-up the affairs of insolvent joint-

CHAP. III. stock companies; and this object is effected by means of a fiat in bankruptcy, to be issued and worked in the same manner as in ordinary cases of bankruptcy, substituting, however, an officer or member of the company for the bankrupt to make the surrender to the fiat, and be examined as to the dealings, etc., of the company, and to prepare the accounts and balance-sheet." In s. 2 it is provided that the bankruptcy of the company shall not be construed to be the bankruptcy of any member in his individual capacity.

9 & 10 Vict.
c. 28.

The 9 & 10 Vict. c. 28, was passed to facilitate the dissolution of certain railway companies. It provides, among other things, that persons who shall have entered into a contract usually called a subscription contract for the formation of a company for making a railway, which cannot be carried into execution without obtaining the authority of an Act of Parliament, may dissolve the same in manner pointed out by the Act. It directs that it shall be lawful for the committee, provisional directors, or other persons, by such contract or agreement entrusted with the management, to call a meeting of shareholders to consider a dissolution; and any five shareholders may require a committee to call a meeting,—and, in default, may call it themselves,—notice thereof being given, by advertisement in the 'London Gazette,' eight clear days, but not more than fifteen days, before the time fixed for holding such meeting.

If a fiat be issued, the company is to be subject to the provisions of the Act for winding-up the affairs of joint-stock companies, 7 & 8 Vict. c. 111, and 8 & 9 Vict. c. 98, s. 28; and, when such dissolution shall be resolved on, the members against whom judgment shall have been recovered shall be entitled at law to be repaid by contribution, from other members, together with costs. The 10 & 11 Vict. c. 102, was passed to abolish the Court of

Review in Bankruptcy, and to make alterations in the jurisdiction of the Court of Bankruptcy and Court for the Relief of Insolvent Debtors. CHAP. III.

III. THE SPECIALLY DELEGATED JURISDICTION is that which concerns the administration of idiots' and lunatics' estates. It is a special commission under a warrant of the king's sign-manual, who, as general conservator of his people, has authority over idiots and lunatics, and the care of their estates. The warrant is countersigned by the lords of the treasury, not directed to the Court of Chancery, but some great officer of the crown. It is not necessary that he should be the person who holds the great seal, although most usually given to him by the warrant, in consideration of its being his duty as chancellor to issue commissions of lunacy and idiocy. This warrant does not confer jurisdiction but only a power of administration. If that power, therefore, be abused, or any wrong done, or error committed, the appeal is immediately to the king in council (*Oxenden v. Lord Compton*, 2 Ves. Jun. 71; *Wigg v. Tiler*, 2 Dick. 552; 2 Madd. 724). This warrant is issued by the king, to avoid solicitations and undue influence of parties seeking to become committees of the lunatic, it having been formerly the custom of the crown to entrust him to the care of proper persons.^j Specially
delegated
jurisdiction.

Whatever doubts exist with respect to the origin of the *extraordinary* jurisdiction, by means of courts separate and independent of the courts of common law, wherein the ordinary course of justice is usually administered, or within what limits this jurisdiction was originally confined, it is certain that the extent of their powers and duties have from time to time gradually ripened, and are now settled down into a permanent and well-grounded authority.

^j 3 Bl. 427.

CHAP. III.
Equitable
jurisdiction;
how divided.

IV. THE EQUITABLE JURISDICTION of the Court of Chancery has been treated of under the following heads: —1, Accident and Mistake; 2, Account; 3, Fraud; 4, Infants; 5, Specific Performance of Agreements; 6, Trusts. Although it may be difficult to see how the manifold doctrines arising out of the equity jurisdiction can be included even under this enlarged classification, yet, by consulting the divisions and subdivisions of each branch, it will be found that without any very arbitrary arrangement these heads include every branch of equity.^k

^k 1 Madd. Ch. Pr. 39.

PART II.

THE EQUITABLE JURISDICTION OF A COURT OF CHANCERY.

CHAPTER I.

ACCIDENT AND MISTAKE.

THIS useful branch of the chancellor's jurisdiction has been recognized from an early period of our legal history ; and perhaps the most ordinary cases in which application is made to a court of equity for relief in respect of accident, is where a deed or instrument on which a title is founded happens to be lost or burnt, or where it has been cancelled by mistake. The court will in such events afford the same relief as might be obtained at law if the instruments were in existence.

Accident
and mis-
take, when
relieved
against.

Whenever the interference of the court is invoked in matters of mistake or inadvertence, it proceeds upon the broad principles of natural justice or conscience. Its jurisdiction is said to have been originally exercised in cases of penalty and forfeiture : as, for example, where, under an obligation to pay money, the obligor paid it and took no acquittance or an acquittance without seal ; or where the money was paid *within a short time* after the day : if judgment were had in any of such cases at law,

CHAP. I. equity would give relief. So, where a party had been prevented by inevitable accident from doing any act which he had bound himself to perform, the party might in like manner have relief from his obligation.^a

Difference of practice, where discovery only and where relief is sought upon a lost instrument.

It seems that when only a discovery of a deed or instrument upon which the demand arises is sought, an affidavit of the loss is unnecessary; for it is presumed that no person who is in possession of the instrument would file a bill for a discovery of it, especially when the expense of a discovery-bill falls upon the plaintiff. But when relief is sought beyond the discovery, in consequence of the loss or destruction of an instrument from which the plaintiff derives his title, an affidavit of such loss must be annexed to the bill; which affidavit is required not as evidence of the loss, but as a security for the propriety of the jurisdiction;^b for the court will not permit a bare suggestion to support its jurisdiction in a matter in other respects clearly cognizable in a court of law, but will require a degree of proof of the ground on which it is sought to transfer the jurisdiction from a common-law court to a court of equity, otherwise a demurrer will be allowed.^c The averment which is inserted in every bill praying relief, for the purpose of giving the court jurisdiction, is not sufficient, as no bill is put in upon oath of the parties.

Principle upon which equity relieves against accident.

It is upon the ground of accident that equity relieves against penalties; but this relief is administered only where the other party sustains no injury by such interference: for if the party cannot be placed in a condition equally advantageous as if the agreement had been performed, the court will not relieve. It will only afford assistance in cases *where the act may be performed afterwards, or a compensation made in respect of it*: such com-

^a *Vide* Spence, Eq. Jurisd.

^b 9 Ves. 466.

^c Mitf. 124, 4th ed.

pensation, however, must be full and complete, so as to restore the party precisely to his former situation. CHAP. I.

Where covenants for the performance of several things are contained in articles, and a large sum of money is stated at the end to be paid upon non-performance of the agreement, that must be considered as a penalty; but where the contract provides that, if a party do a particular thing, such a sum shall be paid by him, then the amount stated may be treated as liquidated damages.^d

When payment of money is considered as a penalty, and when not.

Whenever a penalty is intended merely for securing the enjoyment of some collateral object, such enjoyment is regarded as the principal intent of the deed, and the penalty only as accessorial, or, in other words, as a mere security for the amount of damage actually incurred. Should, therefore, the penalty of the bond be sued for at law, the court, upon application of the defendant, will grant an injunction, and an issue *quantum damnificatur* will be directed. In all cases where penalties are inserted, in the event of non-performance, one party cannot in equity absolve himself from the contract by electing to pay the penalty, if the performance be insisted on by the other party, for the court looks upon the bond as an agreement, unless it appear from the wording of the instrument to have been the intention of the parties that the obligor should have his option of either doing the act agreed upon, or paying the penalty.^e

Where a penalty is merely inserted in an instrument, for securing the enjoyment of some collateral object.

Another instance in which the equitable principle may be seen is in the case of a mortgage, with respect to its redeemable character. It is an old maxim, that "once a mortgage always a mortgage." Proceeding upon this principle, the right of redemption—or, as it is technically called, *the equity of redemption*—is considered as an inseparable incident to a mortgage, and cannot be defeated,

Doctrine of "once a mortgage always a mortgage."

^d 1 Madd. Ch. 41-52, 3rd ed.; and *vide* the cases cited.

^e Ibid. 59. *Vide infra*.

CHAP. I. or even controlled, by any agreement between the parties. There, if it can be collected from the instrument by any fair interpretation that it was the intention to create a mortgage *ab origine*, and not an absolute conveyance, the Court of Chancery will regard any stipulation tending to fetter the right to redeem of no effect whatever; and will look upon such a stipulation in the light of a penalty annexed by the parties to the payment of the money, and therefore relievable in equity, in the same manner as it interferes in the ordinary case of a mortgage which has become absolute at law.^f

Redemption
—as to
mortgages.

This doctrine of redemption, as applied to mortgages, was so equitable in itself that, when once broached and acted upon, it gradually increased in favour until the reign of James I., although the common-law judges, in their anxiety to preserve the ancient landmarks of the law, at first regarded it with their usual mistrust and jealousy: for, during the reign of Charles I. it became fully established that a mortgagor might redeem his estate in a court of equity even after the day appointed for payment; and bills of foreclosure began to be filed by mortgagees to bar or foreclose the right to redeem, unless payment were made by a certain day named. Indeed, when once the courts of equity had assumed the right of treating a mortgage as being merely a security for the debt, and by application of its own principles regarded the mortgagee, after the estate had become forfeited at law, as a *trustee* of that estate for the mortgagor,^g the judges of those courts seemed to be fully resolved to indemnify themselves for having been so long excluded from the exercise of so salutary an interference; and Sir J. Finch, L.K., went even so far as to declare that he

^f 7 Ves. 273; Coote on Mortg. 19, 2nd ed.; 5 Jarm. and Sweet, 80.

^g Seton v. Slade, 7 Ves. 283.

would enforce the equity of redemption against parties until the tenth generation, because it was supposed that he could not purchase without having either actual or constructive notice of the mortgage.^h This was doubtless regarded by the common law judges as a piece of flippant bravery; for Sir Matthew Hale, in the latter part of the next reign, referring to this stretch of power assumed by the equity courts, declared that by the growth of equity on equity the heart of the common law was eaten out, and legal settlements destroyed. "In the reign of Richard II.," says that eminent judge, "the Parliament would not admit of redemption, but now there is another settled course: as far as the time is given man will go; and, if a hundred years are given, man will go so far, and we know not whither we shall go."ⁱ

The doctrine of the equity courts, in respect to these innovations, however, became so agreeable to sound reason and justice that the legislature afterwards took up the matter, for the sake of bringing the common law to recognize and adopt the same principles; and thus 7 Geo. II. c. 20, provides that, where there is an action brought by any mortgagee for the recovery of possession of any mortgaged lands, and there is no suit then depending to foreclose such mortgage, and the defendant shall, depending such action, pay to the mortgagee the principal, interest, and costs, it shall be deemed a satisfaction, and the court may compel the mortgagee to surrender the premises.

Although, in a bill of foreclosure, an order to enlarge the time for payment of the mortgage money is by no means of course,^j yet the court will grant such indulgence

Stat. 7 Geo.
II. c. 20, in
behalf of
mortgagors.

Case in
which the
Court will,
in a fore-
closure suit,

^h Bacon v. Bacon, Toth. 199, temp. Car. I.

ⁱ Roscarrick v. Barton, 1 Ch. Cas. 219.

^j Eyre v. Hanson, 2 Bea. 478.

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—
enlarge the
time for
payment.

under meritorious circumstances, rather than allow a mortgagee, by foreclosure, to obtain an estate greatly exceeding the value of the debt. Thus, where the time fixed for payment was the 31st of July, the mortgagor made default on that day, although he had the money ready to advance, but was prevented by illness from coming to London for that purpose; thus circumstanced, he deputed his wife to come up with the money; but, in consequence of the only London coach which passed near his residence being full on the 30th of July, his wife could not reach town with the money until after the 31st, which alone prevented it being paid on that day,—a motion for a further extension of time was allowed.^k In a foreclosure suit, the two questions are—first, whether there be a mortgage? and, secondly, if there be, then what is due upon it?^l

Penalty in
a bond;
origin of.

It will appear rather surprising, if we recur to those principles of conscience and equity which seem to have been regarded with such favour, and enforced by the ecclesiastical judges whenever an occasion presented itself in opposition to the severer rules of the common law, that the penalty inserted in a bond should have so long escaped their animadversion, and that some expedient at least should not have been attempted in order to relieve an unfortunate obligor from the full amount of penalty, at once so absurd and so unjust. It serves, however, as a proof of the contradiction and inconsistency into which men are prone to fall, merely for the sake of maintaining some favourite theory or scholastic dogma; and, in order to avoid a principle at variance with their system, adopt an evil of tenfold magnitude. Thus, the monkish scholiasts appear, for a considerable period, enamoured with

Erroneous
doctrine of
ecclesiasti-

^k Jones *v.* Creswicke, 9 Sim. 304; Ford *v.* Wastell, Law Times, ix. 373.

^l Atkin, Convey. 465.

the Aristotelian notion that money is naturally barren, and to make it produce money is preposterous, and contrary to its original design. These writers also fancied that the taking of usury or interest for the loan of money was hostile to the spirit of Christianity, and therefore set their faces most resolutely against it. But it was very soon discovered that, unless mankind had no other inducement to lend their money except the trouble and risk of recovering it, they would choose the safer course of keeping it in their own possession. The clerical judges, however, rather than sacrifice their theory, by fixing a moderate and unoppressive rate of interest upon borrowed capital, allowed the penalty in the bond (usually double of the sum borrowed) to be enforced against the miserable debtor, on default of paying the principal at the time agreed upon; he was thus, by ecclesiastical foresight and the decisions of the judges, preserved indeed from splitting upon the Scylla of usury; but, at the same time, he not unfrequently became engulfed in the Charybdis of their own invention.

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cal writers,
in reference
to taking
interest
upon loans.

But the penalty of the bond being a contrivance to evade the monkish constitutions was, in the estimation of the courts of law, regarded as the real debt, which Blackstone considers very pardonable in the judges of those courts to enforce, because, as the law then stood, they could not give judgment for the payment of interest; but afterwards, when the genius of commerce broke through these refined meshes of monkish ingenuity, and the judges in the courts of equity began to open their eyes to the "just and true intent of the penalty," to which they had been directed by the 37 Henry VIII. c. 9,*

Penalty—
an evasion
of the
monkish
doctrine.

* The words referred to are—"That the Act shall not extend to any lawful obligation indorsed with consideration, nor to any statute or recognizance made, or to be made, for the payment of a lesser sum; so that the same obligation, statute, or recognizance, be

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Statute
5 Anne,
c. 16, s. 12.

s. 6. they* thenceforth construed the penalty, as intended by the parties, to be merely a security for the loan, and as it is regarded in the present day—*i.e.* a security for the principal, interest, and costs, occasioned by the necessity of suing upon the bond. For some time, however, after the passing of this Act, the narrow-minded successors to these clerical theorists “still adhered, wilfully and technically, to the letter of the ancient precedents, and refused to construe the payment of principal, interest, and costs, as a full satisfaction of the bond.”† The difference of construction which the courts of law and equity put upon the penalty of the bond occasioned the interference of Parliament, which (as it did some few years afterwards in respect to mortgages, and to which allusion has just been made) seemed to have adopted the principles of the courts of equity; for, by the stat. 5 Anne, c. 16, s. 12, it was declared that “when an action of debt is brought upon any bond, which hath a condition or defeasance to make void the same upon payment of a lesser sum, at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors, or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition of defeasance; yet it shall, and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition of defeasance.”

made for a true, just, and perfect debt, or for the performance of any other true covenants made, or to be made, upon a just and true intent had between the parties, other than in cases of usury, interest, corrupt bargains, shifts, or chevisance.”

* The equity judges, it will be remembered, about this time ceased to be taken from the ecclesiastical body. † 3 Bl. 435.

It was once held that, in case of the loss of a bond (except a voluntary bond), relief would be afforded in a court of equity, upon the principle that at law a party could not recover without a *profert*, and giving *oyer* of the bond; but that no relief could be obtained in equity for a lost note, upon the converse of that principle—viz. that, in proceeding to recover upon a lost note at law, *profert* and *oyer* were not necessary.^m It became a matter of doubt, however, whether the latter doctrine ever was a sound one; and it was determined, by a subsequent case, that a court of equity had a right of jurisdiction to give relief in respect of a note which had been lost or destroyed, upon the ground that to recover at law the plaintiff was bound to declare with a *profert*, and the defendant was entitled to *oyer* of the original instrument.ⁿ But by the Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76, s. 55, *profert* and *oyer* are abolished.

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Equitable relief, in case of a lost bond or note of hand, in consequence of the necessity of *profert* and *oyer* at law.

A court of equity assumes a jurisdiction to interfere in cases of a palpable mistake in written contracts, as it does against frauds; and thus, where an agreement has been entered into for a *valuable consideration*, equity will relieve against a mistake in the execution of it.^o

Relief in cases of mistakes in written contracts.

Before the 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, a conveyance by way of feoffment was not good by the common law unless accompanied by livery of seisin; but equity supplied the defect of such an imperfect conveyance.^p

So equity will afford its aid for the purpose of effectuating

Mistake in the intended

^m See Madd. Pr. 1, and the cases cited in the margin; *Ward v. Turner*, 2 Ves. 31 (n); *Ex parte Greeneway*, 6 Ves. 812; *East India Company v. Boddam*, 9 Ves. 464.

ⁿ *Macartney v. Graham*, 2 Sim. 287; 2 R. and My. 353.

^o *Goring v. Nash*, 3 Atk. 188; *Williams v. Codrington*, 1 Ves. 514.

^p 1 Madd. 50.

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method of
conveying
an estate
relieved
against.

ating the intention of the party, where a man has manifested his intention of disposing of his estate, and mistakes the mode of doing it, provided the instrument be sufficiently valid to carry out the intention of the party within the limits of legal demand. Thus, when a person making a feoffment in fee neglects to convey by livery of seisin, equity (since it was evidently the intention of the party to convey by the common-law assurance) supplies the want of formality of livery *ut res magis valeat quam pereat*, by decreeing that the conveyance shall operate as a covenant to stand seised under the Statute of Uses: in like manner, a bargain and sale, enrolled when there has been a sufficient consideration, has been allowed to take effect as a covenant to stand seised to support the intention of the parties.^a

A court of equity will also give relief where a person claims some benefit under a will, and insists at the same time on claiming, under a different title, property which the testator, through an erroneous impression that it was his own, disposed of otherwise, under the same will: thus, in the case of *Rutten v. Maclean*,^r where a testator, conceiving himself entitled to the property belonging to his wife, made a general disposition of the whole of his estate, and gave her some other property by the same will, the court decreed that she should elect, and that she could not insist on taking the interest bequeathed to her under the will, and yet retain the property which formed the subject of his general disposition.

Election:
upon what
principle
founded.

The doctrine of election is founded on the principle "that a person shall not claim any interest under an instrument, whether it be a deed or a will, without giving full effect to that instrument as far as he can;" or, in other words, if he receive a benefit from the instrument, he shall not be allowed to defeat any of its provisions in

^a Fonbl. Eq. 47.

^r 4 Ves. 531.

favour of other persons. It can only happen where a person has a decided interest before, and a certain benefit left him by will : for, in the absence of such certainty of interest, there can be no election.^s

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Defects in the execution of powers, as also the defective surrender of copyholds, have been relieved against, especially where there has been a valuable consideration^t inducing the execution or surrender, or where the execution of the power has been intended in favour of younger children or a wife, who, in this respect, stand upon an equality with purchasers or creditors.^u Equity will also relieve a defect in the execution of a power of leasing where such defect will not operate as a fraud upon the remainderman—or the mode of executing the power is merely defective, as where the attestation is by one witness only, when two are required, or if a seal be wanting—provided the lessee be, as before observed, in the nature of a purchaser:^v but the court will not help a voluntary defective conveyance, which cannot operate at law, in favour of a bare volunteer. Thus, where a man, seized in fee of freehold and copyhold lands, settled the freehold land on himself for life, remainder to the heirs male of his body, remainder to plaintiff, his brother, in tail, and covenanted to surrender the copyhold lands to the same uses,—and going to make a surrender, in pursuance of his covenant, fell sick by the way, but made a letter of attorney to do it, and died before it was done—without

Defects in the execution of powers, and also the defective surrender of copyholds, relieved in a court of equity.

^s 2 Madd. 62–67. As to what amounts to election, see *Briscoe v. Briscoe*, 1 Jones and Latouche, 335 ; 9 Jur. Dig. 226. See also *Wall v. Wall*, 11 Jur. 403.

^t *Chapman v. Gibson*, 2 Bro. C. C. 229.

^u *Wilkie v. Holme*, 1 Dick. 165 ; *Shannon v. Bradstreet*, 1 Sch. and Lef. 60 ; *Harrington v. Haste*, 1 Co. 131.

^v *Doe v. Weller*, 7 Durnf. and East, 478 ; *Willis*, 176 ; *Attorney-General v. Griffith*, 13 Ves. 576.

CHAP. I. issue male; the copyhold lands descended to his daughters, who were his heirs-at-law. The bill was filed by the brother, to have the defect of the surrender supplied in equity; but the court refused it, on the ground that the brother was but a mere volunteer,—the heir-at-law having an equal equity with a volunteer.^w

Where the formalities required in exercising a power become impossible.

Independently, however, of the instances of creditors, and wife and children, there are some others in which the court will interpose to supply the defective execution of a power, so as to prevent a resulting trust in favour of the heir of the donor,—as when the volunteer claims, under a power, the terms of which by accident become impossible to be executed; for a court relieves against all manner of accidents, since it is unconscionable to take advantage of them: therefore, if a man make a conveyance, with a power of revocation, in the presence of four privy councillors, and he is sent by the reigning monarch to Jamaica, where that circumstance becomes impossible, there equity will allow him to revoke without it.^x

Non-execution.

Relief is not given in cases of non-execution of powers, unless where the power is such as a court of equity considers as partaking so much of the nature and qualities of a trust, that it becomes the duty of the party to whom it is given to execute it: in which case, should the donee die before he has discharged that duty, the court will supply the non-execution of the power.^y

Marriage settlements, in pursuance of articles.

But the most usual case in which the court has been called upon to afford its aid against *mistake*, is the case of settlements executed subsequent to marriage, purporting to be made in execution of articles entered into

^w Francis's Max. 14 (Cas. 15).

^x *Vide* Fonbl. Tr. Eq. b. i. c. 5 (h), and the case of Bath v. Montague, 3 Ch. Cas. 68, referred to.

^y 1 Madd. Ch. 75; Watk. Conv., by Morley and Coote, 8th ed., 267 (n).

before marriage. And thus, where in such cases the court is called upon to interpret articles which in their strict legal operation would create a limitation in tail, it will look at the motive of the settler, and presume that he intended rather to benefit the children of the marriage than the parties themselves. Therefore, where the words of the articles would by operation of law create an estate tail, and so give the parents a power to defeat the intention of the settler by barring the issue, equity will, on the ground of a mistake, decree a strict settlement, and so frame the instrument that the main objects, namely, the issue of the marriage, shall not be defeated of the provision intended by the articles of settlement.^z

The general principle upon which the court proceeds in marriage articles thus framed is, that articles made previous to, and in consideration of, marriage, are considered rather as instructions for settlements than as instruments complete in themselves;—or as “heads of agreement,” to be afterwards drawn out at length, according to the usual course of such settlements, and that a provision for the children is one of the great and immediate objects of this agreement.^a

Articles; in what light viewed by the Court.

But the court will not interfere where both the articles and settlement are made *before* the marriage, unless the settlement in such case be expressly made in pursuance of the articles; neither will equity reform a marriage settlement on the ground of mistake, unless the evidence as to the mistake, and the real intention of the parties, be perfectly clear and satisfactory: insomuch that where, from other provisions or limitations in other lands, it appears that the party knew and intended the distinction, or where by a difference in the penning the parties in-

The Court does not interfere where both articles and settlement are made before marriage, unless, etc.

^z Fearne, Cont. Rem. 112.

^a 1 Madd. 84; Watk. Conv., by Morley and Coote, 246-7.

CHAP. I. tended to leave a portion in the father's power, a strict settlement will not be decreed.^b Thus, where by articles part of an estate is limited to the father for life, remainder to the wife for life, remainder to the first and every other son and daughter in tail, and another part to the father for life, and the heirs male of his body by that wife, Lord Macclesfield said, if the latter had been the sole limitation, he should without scruple decree a strict settlement according to the common rule; but where the parties had shown that they knew the distinction, when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation,—decreeing to the father in tail as to the last, though not as to the first limitation.

It appears also that where both the contracting parties have been led into an error, and the subject on which the mistake arose was from its nature doubtful at the time of the agreement, and neither of the parties were cognisant of it, equity will not give relief.^c

Mistake in wills, etc., where the error is patent.

Equity will also lend its aid for the purpose of relieving against mistake in wills or other documents of a testamentary nature, especially when the mistake is so evident as to show in itself that it was quite contrary to the intention of the testator. But it is said that where a court of equity interferes to rectify a mistake in a will, it *must be apparent on the face of the will*;^d and where the expressions made use of in the will are clear and positive, however their legal sense may operate against the intention of the testator, equity cannot admit parole evidence to show the mistake and point out the true meaning of the testator. Thus, where in his will the testator has

^b Marquess of Breadalbane v. Marquess of Chandos, 2 My. and Cr. 740; Howel v. Howel, 2 Ves. 358.

^c Mortimer v. Capper, 1 Bro. C. C. 158.

^d Whitfield v. Clement, 1 Meriv. 402.

finally limited his estate without any reference to a further execution thereof by a conveyance^e—that is, where there is nothing left to be done under the direction of the court in reference to the trust, but the limitation is irrevocable, and so completely declared as to take effect by the very deed which conveys the legal estate to the trustee—it is called a *trust executed*, and such a limitation must take its course at the common law; for, as a testator may give what estate he pleases, so far as his power over the property extends, it follows that, when he has clearly and finally devised his estate, by expressions carrying a certain unequivocal import, the court has no right to presume that he intended to convey his estate differently from what he has expressly declared.

If, therefore, he direct his trustee to convey an estate to A and the heirs of his body,^f A takes the estate as a conveyance at common law—that is, an estate tail—and no evidence dehors the will can be admitted to prove the object of the testator was to give only a life estate to A; and if, by any other instrument, a person has created a trust in such a manner as to render it conclusive against himself, it is an executed trust. Trust executed.

But when the trust is said to be *executory*—that is, where the limitations are incomplete, and are to be carried into execution by some future act to be done by the trustee, as where the testator has directed his trustees to convey, etc., and has clearly expressed his intention, or it may be clearly implied from the words of the will that he intended only to give a life estate to the first tenant—equity will, in such a case, by analogy to the instance of marriage articles, of which we have before spoken, inter- Trust executory.

^e Fearne, Cont. Rem. 143, 8th ed.; Walk. Convey., by Morley and Coote, 245.

^f Legate v. Sewell, 1 P. Wms. 142.

CHAP. I. fere, and mould the conveyance so as best to meet the intention of the testator;^g and thus, instead of creating an entail will limit the estate in strict settlement, by giving only a bare estate for life, with remainder to the issue in tail.

Difference between a creditor and a volunteer claiming under an executory trust.

There is this distinction also observed in a court of equity, in respect to the interests of volunteers claiming the benefit of a trust. "A declaration of trust," says Lord Langdale (2 Keen, 134), "is considered, in a court of equity, as equivalent to a transfer of the legal interest in a court of law; and if the transaction by which the trust is created be *complete*, it will not be disturbed *for want of consideration*: if the transaction rest upon an agreement not conferring the legal interest—if it be an *executory* contract—this court, in the absence of consideration, will not give effect to it." Where also a will is cancelled by mistake, or on the supposition that a later will is good, which proves to be invalid, this circumstance does not let in the heir, but will be relieved against in a court of equity.^h Equity will also correct a mistake in the name of a legatee in his favour, by circumstances of description sufficient to point out the party intended to take.

Exception to the rule "Ignorantia juris non excusat."

The courts of equity have, in many instances, abated the rigour of the old and favourite maxim, "*Ignorantia juris non excusat*," by holding that it was in regard to the public that ignorance cannot be pleaded in excuse of crimes, but does not hold in civil cases:ⁱ and equity has, in several instances, relieved the party from the effects of a contract founded on a misapprehension of *law*; and Lord Thurlow once said that money paid on a mistaken notion of *law* might be set right at any

^g Marryat v. Townley, 1 Ves. 130.

^h 1 Madd. Ch. 114.

ⁱ Lansdowne v. Lansdowne, Mos. 364.

length of time:^j and it is now a settled rule that, whenever one contracting party is ignorant of his rights, and that ignorance is taken advantage of by the other, equity will relieve.^k But it must be observed, that the opinion of Lord Chancellor King, in *Lansdowne v. Lansdowne*, that the maxim "*Ignorantia juris non excusat*" does not hold in civil cases, has not been followed in modern times.^l

This rule is in accordance with the doctrine of the Civil Law, which, in this instance, our lawyers have adopted. Among the Roman jurists, however, it was applied with pretty much the same caution and qualification, that an outstanding term is allowed to avail in favour of an innocent purchaser against mesne encumbrances—that is, provided the purchaser was, at the time he completed his contract, ignorant of the fact that the estate was subject to charges; but not if he had knowledge of the transaction; for then he would be doing an injury to the encumbrancers with his eyes open. A purchaser (to borrow Lord Eldon's idea upon this subject) is at liberty to lay hold of an outstanding term to protect himself as with a shield, but he has no right to use it as a sword. Thus, among the Civilians, ignorance of the law does not come in to aid those persons who are seeking to appropriate the property of others, but only when they are endeavouring to secure their own; for, in the words of the Digest, "*Juris ignorantia non prodest adquirere volentibus, suum verò petentibus non nocet.*"^m

How understood in the Civil Law.

^j *Jones v. Morgan*, 1 Bro. C. C. 219.

^k *Jarvis v. Duke*, 1 Vern. 19; *Gee v. Spencer*, ib. 32; *Broderick v. Broderick*, 4 Vin. Ab. 534; 1 P. Wms. 239; *Bowles*, 1 Sch. and Lef. 209; *Murray v. Palmer*, 2 Sch. and Lef. 474; *Evans v. Llewellyn*, 2 Bro. C. C. 150; *East India Company v. Donald*, 9 Ves. 275; *Clifton v. Cockburn*, 3 My. and K. 76.

^l *Stewart v. Stewart*, 6 Cl. and Fin. 966.

^m Dig. L. 22, t. 5, s. 7; Doc. and Stu. b. ii. c. 46, 47.

CHAPTER II.

ACCOUNT.

Account;—
concurrent
jurisdiction
exercised by
courts of
law and
equity.

Almost
confined
to courts of
equity.

ALTHOUGH a party filing his bill in a court of equity, in cases of an account, may be entitled to his remedy at common law; yet the advantages of proceeding in equity, in almost all matters of this nature, have been so sensibly felt by a long and steady experience, that by degrees this Court has obtained a concurrent jurisdiction with those of common law. It is said that the ground upon which equity first began to assume this power was the difficulty of obtaining complete justice in the courts of common law; for, although the action of account lies at common law, yet, when the accounts are brought before the auditors of these courts, there is so much difficulty and delay in settling them (especially if they be long and intricate), that recourse is now seldom had at law for that purpose—a court of equity having the advantage, by its mode of proceeding, being peculiarly adapted for the task, of investigating matters of account, as between adverse parties, and compelling the payment of whatever balance is found due to the party entitled.^a “The jurisdiction in matters of account,” says Lord Cottenham,^b “is not exercised, as

^a Mitf. 120, 4th ed.

^b North-eastern Railway Company v. Martin, 2 Phil. 762.

in many other cases, to prevent injustice which would arise from the exercise of a purely legal right or to enforce justice in cases in which courts of law cannot afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of persons.”

In order to maintain a bill for an account, it is necessary that it should relate to that which is the subject of mutual acknowledgment.^c

Bills for account are frequently brought by heirs, legatees, and creditors, against executors and trustees. It is also the usual mode of obtaining relief by partners against each other, by principals against their factors and agents, and by mortgagors against mortgagees who have been in possession, and *vice versa*.

Whenever the plaintiff succeeds in establishing that the defendant stands towards him in the relation of trustee, or quasi-trustee, his right to an account seems to follow as a necessary incident to that relation.^c

The objection to a court of law for taking a long arithmetical account is pretty clearly laid down by Mr. Justice Taunton, in *Ferguson v. Sprang* (3 Nev. & Man. 665); which was a question of usury, where A, in consideration of £200, granted to B an annuity or rent-charge for sixty years, charged upon certain messuages. “It is difficult,” says the learned judge, “for us to say by how much this reservation of £20 a year for sixty years will exceed the principal and interest at 5 per cent. We cannot compute it. It is too difficult a question for the Court to take judicial notice of. If this were a question, whether ten were more than five, or that two and two made four, the Court would take judicial notice of it. Here the question depends upon a difficult calculation, and ought therefore

Difficulty of
taking ac-
counts at
law.

^c *Taff Vale Railway Company v. Nixon*, 1 Cl. and Fin. 111.

^d *Madd.* Ch. 115 (n).

CHAP. II. — to be inquired into by a jury.” This case coming before the K. B. on a demurrer, L. C. Justice Denman, in reference to *Fennday v. Wrightwick* (1 Rus. & My. 45), and the power of a court of chancery in taking matters of account, said “that was of no authority, as the master of the rolls might have acted there in the capacity of a court and of a *jury also* ;” “which,” said his Honour the V. C. of England, in *Chillingworth v. Chillingworth* (8 Sim. 413), “contains the pith of the case—namely, that the master of the rolls sat as jury as well as a judge, as I do.”

A party having no right at law for account is remediless in equity.

A right to account being founded upon the same principle, whether at law or in equity, it follows that whenever a party cannot recover at law, he is generally remediless in a court of equity;^e but it was held by C. B. Alexander that it is not every account which will entitle the court to interfere, and that it must be such an account as cannot lie fairly and justly in a court of law.^f

Account between tradesman and customer.

A bill for an account may sometimes be filed between a tradesman and his customer, especially where securities have been obtained from an extravagant or inexperienced young man by means of misrepresentation;^g and in a MS., 14th December, 1791, in the court of Exchequer,^h Lord Chief Justice Eyre expressed an opinion that dealings between a tradesman and his customer are the subject of account in a court of equity,—not, however, if their dealings have been confined to a single payment, but where there had been a series of demands on the one side, and payments on the other.

Set-off at law will not be enter-

A court of equity will not entertain a suit, if the subject be capable of proof, and a matter of *set-off* at law; be-

^e 13 Ves. 278.

^f *Frietas v. Das Santos*, 1 Y. and Jerv. 576.

^g *Lord Courtenay v. Godschall*, 9 Ves. 473.

^h *Wellings v. Cooper*.

cause, in general, where the party may have his remedy in a court of law, equity will not interfere. Thus, where, as between *landlord* and *tenant*, the accounts are too varied and complicated to be taken at law, the tenant may file his bill for that purpose; yet, if the tenant's counter-demand amount to a legal set-off, he will have no relief in equity.ⁱ

CHAP. II.

tained in
equity.

A bill for an account will also lie against a factor or his representatives on behalf of his principal, unless the factor be an infant.^j

Factor and
principal.

An heir, for the purpose of filing a bill in equity for an account, must aver upon the record that there exists an impediment to his recovering at law; and this averment must be capable of proof, as that the defendant has in his possession the title-deeds necessary to maintain his title, or alleging that there are outstanding terms which may prevent his recovering at law, or any other obstacles which may prevent it; equity then directs the heir to bring an ejectment, providing that the defendant shall not set up at law any term, whether satisfied or not.^k These impediments being put out of the way, a trial is had before the proper tribunal: the parties then come back to the court of equity for the account, the title-deeds, papers, etc. This process is called an *equitable ejectment*, and the bill an *equitable bill*. This method of proceeding is generally preferred to that of directing issues; the granting of which is discretionary with the court.^l

Account by
heir-at-law.

A joint debt cannot be set off against a separate debt at law; but in equity, under peculiar circumstances, it may—namely, where there is a distinct series of transac-

Joint debts;
how dealt
with.

ⁱ Townrow v. Benson, 3 Madd. Rep. 203.

^j Smalley v. Smalley, 1 Eq. Abr. 6.

^k Pemberton v. Pemberton, 13 Ves. 297; 4 Ves. 66.

^l 1 Madd.

CHAP. II.

Rents,
profits of
estates.

tions wherein joint credit had been given.^m An equitable set-off is where, by reason of the cross-demand, there can be no set-off at law.ⁿ

We have before observed, in respect of the right to account, that where a party cannot recover at law he is without remedy at equity. The same principle holds in like manner where an account is directed to be taken of *rents and profits* of estates; for, as upon a legal title, six years only of mesne profits are recoverable at law, so, where a trust estate is recoverable in equity, the account of rents and profits is not allowed to extend beyond six years,^o unless in the case of an infant, where an account will be ordered from the time the infant's title accrued; for every person entering on the estate of an infant is considered as his guardian or bailiff.^p An exception is also made where the plaintiff has been kept out of possession by unfair means on the defendant's part, such as misrepresentation, concealment, or fraud.^q

Partnership
transactions.

An account of *partnership transactions* is also a matter for the jurisdiction of a court of equity; and it seems not necessary now that the bill should for that purpose pray a dissolution of partnership,^r although formerly held otherwise.

Unsettled
state of the
law as to the
necessity of
a dissolution
of partner-
ship when-
ever ac-
counts are

It is much to be regretted, that the law upon this subject should have so fluctuated with the conflicting opinions of the several judges who have been called upon to adjudicate a point of so much importance to the commercial world; for since the decision of *Harrison v. Ar-*

^m *Williams v. Noble*, 3 Mer. 618.

ⁿ Per V. C. Leach, in *White v. O'Brian*, 1 S. and K. 551.

^o *Stackhouse v. Barnston*, 10 Ves. 469.

^p *Dormer v. Fortescue*, 3 Atk. 130; *Bloomfield v. Eyre*, 8 Beav. 250; 10 Jur. Dig. 98.

^q *Bennett v. Whitehead*, 2 P. Wms. 645.

^r *Harrison v. Armitage*, 4 Madd. Rep. 143.

mitage, referred to in the note, the case of *Loscombe v. Russell*^s came before the court, in which a bill was filed by one partner against his co-partners, to have the accounts of the partnership taken, without praying a dissolution: to this bill the defendants, upon that ground, demurred, and his honour the vice-chancellor of England (notwithstanding the case of *Harrison v. Armitage* was cited) allowed the demurrer. Upon a subsequent occasion, however,^t the same learned judge declared that the court ought to interfere between co-partners, wherever the act complained of was one that tended to the destruction of the partnership property, although a dissolution of the partnership might not have been prayed. On the other hand, in the case of *Knebell v. White*,^u Mr. Justice Alderson held that a bill for an account of partnership transactions must pray for a dissolution of the copartnership; and, where there is an open account, the party who seeks redress must put it in the power of the court to close finally by its decree the disputes between the parties: as soon as this is done, he is entitled to its assistance.

CHAP. II.
sought by
one partner
against
another.

The lunacy of a partner, who has contracted to be actually engaged in the partnership, may perhaps warrant the dissolution of the partnership,—especially if he be pronounced incurable; and if the objects of the partnership cannot be carried out upon the terms upon which it was entered into, by reason of the conduct of certain of the partners, it will be dissolved, although one of the partners object to the dissolution:^v and where one partner filed his bill, on the ground of insanity, the vice-

^s 4 Sim. 8.

^t *Miles v. Thomas*, 9 Sim. 609; *Walworth v. Holt*, January 15, 1841, C. C. 4 My. and Cr. 619.

^u 2 Yo. and Coll. 15.

^v 1 Madd. Ch. 135.

CHAP. II. chancellor decreed a dissolution, as from the date of the decree.^w

The master of the rolls, in a late case,^x observing upon the general rules of the court, first, that all persons interested in the subject-matter of the suit ought to be made parties, and, secondly, that, in order to do complete justice in every case, and not leave matters involved in the suit to be the subject of future litigation, says, that it was, at one time, supposed, under the second general rule, that the court could not, and would not, interfere with a partnership at all as between partners, unless the partnership was to be dissolved, and finally wound up, and settled; and there are many conflictory cases in the books on the subject, different judges having expressed very strong opinions upon the different views of the question. It now, however, appears very clear, that there is no such rule as that; for it has been decided that, in a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, and claim the benefit of that interest for themselves, a bill may be filed against these few, by one or more, on behalf of all the rest: and in a more recent case,^y in which the above decision was alluded to, it was held that one partner may have an account and general relief, as against another, without praying to have the partnership dissolved, and the affairs wound up.

Co-obligors. Here it may not be out of place to state that, in the absence of any contract, there are certain obligations between parties standing in those peculiar relations towards each other, which are enforceable in a court of equity, as being founded upon principles of natural justice. Thus,

^w *Sander v. Sander*, 2 Coll. 276; 10 Jur. Dig. 124.

^x *Richardson v. Hastings*, 8 Jur. 208; 7 Beav. 301.

^y *Fairthorne v. Weston*, 2 Law Times, 497; 8 Jur. 353; 3 Hare, 387.

where a number of persons are liable, *in solido*, to one common debt or duty, any one of them may be called upon by the creditor to discharge the whole of the debt, or a greater amount than his actual proportion of it; for each one is liable to the creditor for the whole amount. In such a case, the debtor who pays has a right to sue the rest for contribution proportionably to the amount so paid. In the case of suretyship, the same right also exists to enforce contribution from the co-sureties, where one of them has been compelled to pay the whole demand against the principal.^z For the sureties have a common interest and a common burden. Co-sureties.

The doctrine of contributions amongst co-sureties is not founded in contract, but it is the result of general justice from the equality of burden and benefits. Therefore where three or more sureties were bound by different instruments, but for the same principal and the same engagements, they are bound to contribute.^a

The courts of law proceed upon the same principle against co-defendants, where the plaintiff may have judgment and execution against any one of them for the whole amount. The same right of contribution, however, is allowed as between such co-defendants, by means of the equitable action of *assumpsit*:^b but, as in equity, contribution does not arise where the obligation proceeds from the wrongful act of the parties, each one being liable for all the consequences;^c so, in law, if the amount recovered be by an action founded in tort, no contribution can be enforced between the parties.^d Co-defendants; right of contribution against,

^z Tothill, 103, tem. Car. I.

^a Per L. C. Baron Eyre, in *Dering v. Earl of Winchelsea*, 1 Cox, 318.

^b *Kemp v. Finden*, 7 Jur. 65.

^c Per Lord Cottenham in *Attorney-General v. Wilson*, 1 Craig and Ph. 98.

^d *Pearson v. Skelton*, 1 Mees. and Wels. 504.

CHAP. II.

The right to contribution is thus recognized, both at law and in equity, with this distinction, however, that at law a surety is in every case entitled to contribution from his co-sureties in proportion to their number, without having regard to the insolvency of any one of them, which however a court of equity respects. Thus if A., B., and C. be co-sureties, and A. is called upon to discharge the debt, he is entitled to recover at *law*, a third only from B., though C. may have become insolvent, whereas in *equity* he will be entitled to one-half.^e

borrowed
from the
Roman Civil
Law.

The doctrine of contribution was evidently borrowed from the Roman law, to which it bears a striking analogy. By that law, each of the sureties was liable to the creditor for the whole amount of the debt; yet, as between themselves, only proportionably. Justinian, however, provided that the creditor should, first of all, sue the principal debtor, and recover what he could from him before he proceeded against the sureties.^f Any surety who had paid was entitled to a cession of the securities from the creditor, not only for the purpose of proceeding against the principal, but also against the other sureties, to compel contribution.^g The Romans might have early adopted their ideas of this doctrine from the provisions contained in the maritime laws of the Rhodians: where part of the goods and cargo were thrown overboard, for the purpose of saving the ship,^h those whose goods were preserved from the general sacrifice were, nevertheless, compelled to make a proportionable contribution to the sufferers, since it was done for the benefit of all. This gave rise

^e *Vide* Sm. Mer. Law, p. 453, 5th edit.

^f Nov. L. 4, c. 1.

^g Spence, Eq. Juris. 662 (n).

^h "Si levandæ navis gratiâ, jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est."—D. 14. 2, ss. 1 and 2.

to the curious question, as to whether the value of the lost merchandise was to be taken at the time of purchase in the foreign market, or that which it would have fetched in the market at home. CHAP. II.

Persons standing in the characters of agent, auditor, land-steward, and manager, are liable to account with their respective employers: a bill for an account will also lie on behalf of a legatee against an executor. And if an agent or bailiff has mixed the property of his principal with his own, so as not to be capable of distinguishing between the one and the other, he loses the whole; and this also is in accordance with the doctrine of the Civil Law. Account against agent, auditor, etc.

Although the Statute of Limitations be no bar to an open account, yet, if all transactions between merchant and merchant have ceased above six years, the statute will prove a bar,ⁱ and the court, for the purpose of discouraging laches and neglect, will not favour the prosecution of a stale demand, and this from motives of public policy; for, notwithstanding time in itself does not operate to bar the right of a plaintiff to an account, yet, where a party has slept upon his right for a long time, the very forbearance presumes either a satisfaction of the plaintiff's claim, or that he intended to abandon it.^j A stale demand in matters of account not encouraged in equity.

It seems that the court will not allow a *stated* account to be unravelled, unless where *fraud* has been mixed up with it;^k and error will be sufficient to open an account settled by arbitrators, provided specific errors be shown: and it seems necessary that errors should be specifically alleged in the bill, to show the court a sufficient reason for its being filed. Exception in cases of fraud.

Formerly when any one of the parties could point out

ⁱ Barber *v.* Barber, 18 Ves. 286.

^j Sturt *v.* Mellish, 2 Atk. 610.

^k Vernon *v.* Vawdrey, 2 Atk. 119.

CHAP. II.
Surcharge
and falsifica-
tion.
Alteration
in practice.

an omission for which credit ought to have been given, it was called a *surcharge*; and if any wrong charge had been inserted, it was technically denominated a *falsification*.¹ But now, by the 15 & 16 Vict. c. 86, s. 54, where any accounts are required to be taken at chambers, the court may give directions as to the manner in which they are to be taken or vouched; and by the 23rd Ord., 16th October, 1852, no states of facts, charges, or discharges, are to be brought in; and by the 29th Ord. *ibid.*, it is ordered that when any account is to be taken, the accounting party is, unless the judge shall otherwise order, to make out his account and verify the same by affidavit.

¹ 1 Madd. Ch. 145.

CHAPTER III.

FRAUD.

SINCE the abolition of our English Inquisition—the Star Chamber^a—which, in a great many instances, took cognizance of fraudulent transactions, and punished the guilty party, that most extensive province of jurisdiction, namely, of examining and relieving in all cases of fraud, has fallen principally, if not *almost exclusively*, upon a court of equity: for, as a court of common law does not possess the means of sifting the fraud, by fastening on the conscience of the fraudulent person, and purging him by oath, the offence belongs to an equitable tribunal, which is peculiarly adapted by its constitution to attain that object.

Fraud ;
cognizance
of, since the
abolition of
the Star
Chamber.

Equity takes cognizance of fraud only in a *civil*, and not in a *criminal*, point of view ; therefore, it cannot punish the offender, as we have seen was the case in the Court of Star Chamber, before it was put down.

Jurisdiction
of equity
in cases of
fraud.

The jurisdiction of a court of equity, in matters of fraud, exercises itself in two ways—1, To *prevent* fraud ; 2, To *redress* fraud after it has been committed.

1. Under the former head, we may reckon those cases wherein equity has interfered, from motives of policy, to

^a 16 Car. I. c. 10.

CHAP. III. — prevent the purchase of estates, by persons invested with a fiduciary character, from the parties from whom they hold; which transactions, although strictly honest, and but for the relative situations of the parties not to be impeached, yet—considering the influence likely to be possessed by the person entrusted with the property, his intimate knowledge of the same, and the dangerous temptation thereby presented to him, to use such influence and knowledge for his own advantage—a court of equity watches with a jealous eye over the acts of a trustee, and will not, in such a case, allow him to become a purchaser of any part of the trust estate;^b for equity, relying on the truth of the maxim, “*Emptor emit quam minimo potest, Venditor vendit quam maximo potest,*” will consider the frailty of human nature, and that a person possessing the opportunity of serving his own interests will be in danger of doing so at the expense of another; and it was said, *arguendo*, in the case of the York Buildings Company *v.* Mackensie,^c that the grounds on which that disqualification rests is no other than the principle which allows no person to be judge and party in the same cause.

Contracts
between
trustee and
cestui que
trust dis-
counte-
nanced by
the Court of
Chancery.

Lord Hardwicke, in *Davidson v. Gardner*,^d said it had been laid down as a general rule, that where a trustee, for persons not *sui juris*, as infants and *feme covert*s, becomes both buyer and seller, the court will in nowise, be the circumstances ever so fair between the parties, establish a purchase of that kind, unless it be legitimated by the sanction of the court, or some public act; from which exception it appears that trustees might purchase the estate of infants who are *cestuis que trust*, if the sale took place before a master.^e But even this exception in

^b *Ex parte Bennet*, 10 Ves. 381; *Ex parte Morgan*, 12 Ves. 6.

^c 8 Bro. P. C. 63.

^d Chan., 21st July, 1743, MS.

^e Sug., V. and P.

favour of trustees was found to be prejudicial; for, within a few years after the last decision, the same judge determined that a trustee could not even buy at a *sale by auction*; ^f so that a purchase by a person of the trust property, whether he be a trustee for adults or infants, would have been set aside, although the estate had been sold under the direction of the court, before a master, or by public auction; * and the court would not have permitted trustees to give up their office, and bid. Where, also, a person is unable to purchase the estate himself, he cannot buy it as agent for another, and perhaps would not be allowed to employ even a third person to contract or bid for the estate on behalf of a stranger. ^g

If a trustee for sale of an estate on behalf of an infant be desirous of becoming the purchaser, he must file a bill to carry the trust into execution under the decree of the court, and then upon the sale, apply for leave to purchase, by offering to give more than any other person. ^h

The solicitor of a trustee will not be allowed to purchase the trust estate. ⁱ

It was formerly held that, where lands were devised to executors to be sold, an acting executor could not sell to a renouncing executor; because he was privy and party

^f *Whelpdale v. Cookson*, Reg. Lib. B. 1748, fol. 552; cited in *Campbell and Walker*, 5 Ves. jun. 682.

* The stringency of this rule however has been abated in modern practice; whether for better or worse it is hard to determine.

^g Sug., V. and P., *Ex parte Bennet*, 10 Ves. 381. *Sed quære*. This case was under a bankruptcy, where the rule against purchasers of trust property by the trustee applies with more force to assignees in bankruptcy. There cannot however be any objection to a purchase by a person named as a trustee, but who has disclaimed, without having ever acted in the trust.—*Lewin on Trusts*, 363.

^h *Whelpdale v. Cookson*, Reg. Lib. B. 1748, fol. 552, cited in *Campbell and Walker*, 5 Ves. jun. 682.

ⁱ *Downes v. Grazebrook*, 3 Meriv. 200.

Trustee for
sale on
behalf of an
infant.

Executors
and trustees
for sale.

CHAP. III. to the last will, and remains executor still.^j But this doctrine has been overruled at law;^k and in equity it would depend on its own peculiar circumstances. The court would most probably see fit to set it aside, if the sale were prejudicial to the *cestui que* trust. Executors do not disqualify themselves from executing a power of sale over a real estate, from the circumstance of their having renounced probate of the will as to personal estate.^l

Reasons
why neither
an auction-
eer nor a
mortgagee
can pur-
chase.

With respect to an *auctioneer*, it is said that Lord Eldon has expressed himself strongly against the validity of a purchase made by him, of the property he is employed to sell; and, perhaps, upon the principles which govern the case of trustees, the better opinion is that such a sale would be set aside. It is the same principle which guides the court in the case of a trustee and *cestui que* trust, in respect of the trust fund, that a mortgagee shall get no advantage out of the mortgage fund, beyond principal and interest,^m and which induces the court sometimes to set aside a sale, between a mortgagor and mortgagee, of the equity of redemption.ⁿ But it should be observed, with reference to mortgages, the court, in taking accounts between mortgagor and mortgagee, will, for the sake of doing justice to all parties who claim its protection, direct annual rests. Annual rests are, in conveyancing, somewhat similar to the much-talked-of sinking fund in fiscal language: it is where a mortgagee has entered into the annual receipt of the rents of the mortgaged property, and after paying himself thereout the yearly interest of the mortgaged money, finds himself in

Annual
rests.

^j Co. Litt. 113 (a).

^k Denne d. Bowyer v. Judge, 11 East. 288; Mackintosh v. Barber 1 Bin. 50.

^l Yates v. Compton, 2 P. Wms. 308; Keilw. 45.

^m Gubbins v. Creed, 2 Sch. and Lef. 218; Webb v. Rorke, *ibid.* 661.

ⁿ *Ibid.* 673.

the possession of a surplus; this being from year to year applied to the reduction of the principal, is denominated annual rests, which are subject to various regulations. CHAP. III.

It appears that annual rests will not be directed where there was an arrear of interest due at the time the mortgagee entered into possession and receipt of the rents; even after such an arrear of interest has been paid off, and though it should happen that the amount of rents far exceeds the yearly interest of the mortgage money.^o

Rules
observed
in respect to
annual
rests.

But, notwithstanding there was an arrear of interest when the mortgagee entered into possession, yet, if he has received a portion of rents and profits sufficient to pay off his principal and interest, rests will be directed to be taken against him from the period of such discharge, with interest from time to time upon the balance in hand; the mortgagee now being considered in the character of trustee for the mortgagor, in respect of the rents to the mortgaged estate, after the principal and interest are paid off.^p

Also, when, by an agreement between mortgagor and mortgagee, the latter consents to join the arrears of interest to the principal, so that by the time he enters into possession the whole is consolidated into one fund, and considered as principal; if the mortgagee continue in possession after the statement of the account, and there appear no interest due to him, he will be dealt with from that time as a mortgagee who takes possession without any interest being in arrear, and will be charged with rests for the purpose of reducing the principal.^q

The court will direct annual rests when there is no

^o *Davis v. May, Corp.* 238, 19 Ves. 383; *Latter v. Dashwood*, 6 Sim. 462; *Finch v. Brown*, 3 Beav. 70.

^p *Quennell v. Beckford*, 1 Madd. 269; *Wilson v. Metcalf*, 4 Russ. 530.

^q *Wilson v. Cluer*, 3 Beav. 138.

CHAP. III. arrears of interest at the time the mortgagee takes possession, unless the surplus of the annual rents and profits be very small.^r

Cases in which a solicitor or attorney may purchase of his client.

Although a court of equity watches over the conduct of solicitors and attorneys, whilst managing the business of their clients, with the same jealous policy, so far as not allowing them to purchase the property while it continues to be the object of litigation, yet, when the relationship between them is at an end, and all apprehensions as to improper influence thereby cease to exist, a client may, from motives of generosity, make over part of the property by a voluntary conveyance to his solicitor, as well as to any other person.^s

Precaution necessary to be observed in so doing.

In a transaction of this kind, however, the solicitor ought to take the precaution of severing the connection between himself and his client, and putting him (as it has been expressed) at arm's length, by calling in the aid of a third person, to act as agent for both parties; for, if this point of delicacy be not observed, equity will not be very punctilious, should inquiry arise, and the matter be brought before the court for the purpose of being examined into, in setting aside the contract: in such an event the task of proving that everything connected with the transaction was fair will be thrown upon the attorney; it will, at all events, give the party costs.^t An attorney will not be allowed to purchase anything in litigation, of which litigation he has had the management.^u

^r *Shephard v. Elliott*, 4 Madd. 254; *Donovan v. Fricker*, Jac. 168.

^s *Wells v. Middleton*, 1 Cox, 112; *Wright v. Proud*, 13 Ves. 138.

^t *Gibson v. Jeyes*, 6 Ves. 277; *Huguenin v. Baseley*, 14 Ves. 300; *vide Hunter v. Atkins*, P. Coop. 464; *New v. Jones*, 9 Jarm. Prec. 731, 3rd edit.

^u 1 Madd. Ch. 161; *Hall v. Hallal*, 1 Cox, 134.

In a late case,^v it was observed by Sir James Wigram, CHAP. III. that there is no positive incapacity in a solicitor to purchase from his client, as in the case of a trustee and *cestui que* trust; but the rule which the court imposes is, that, Duty of solicitor or attorney to prove the bona fides of such a transaction. inasmuch as the parties do stand in a relation which gives, or which may give, the one an advantage over the other, the onus lies on the solicitor to prove that the transaction is fair.

Also, in a more recent case, before the master of the rolls,^w the defendant, a solicitor, was also a trustee of property under a will, for the plaintiffs. The defendant had been engaged in certain law proceedings, in behalf of the plaintiffs, in reference to the sale of the trust estate, and had delivered to them a bill of costs, and a draft of a release to himself as trustee, duly accounting for the trust property after deducting the amount of his bill. This draft was detained by the plaintiffs for a fortnight, who then executed the deed. They afterwards filed their bill to set aside the release, and to have their shares of the testator's estate paid over to them, without allowing the defendant anything for his professional services in respect to the trust. There was no objection raised as to the charges, but that the defendant, who was a trustee, had no right, upon the general principle, to charge for services done as solicitor to the trust. The master of the rolls, however, allowed the release to stand, upon the ground that the parties, having the draft release by them for so long a time, must be presumed to have executed it with a full knowledge of its intent and operation; and his lordship therefore dismissed the bill with costs.

It is generally understood that, whenever the relationship of employer and agent is found existing in situations General rules necessary to be

^v *Edwards v. Meyrick*, 6 Jur. 924; *Thomas v. Philipps*, 8 Law Times, 272; 11 Jur. 80.

^w *Stanes v. Parker*, 10 Jur. 603.

CHAP. III.
regarded
where per-
sons stand in
situations of
confidence.

where, of necessity, much confidence must be placed by the employer in the agent, the court will exercise its watchfulness, lest that confidence should be abused; therefore, the same principle upon which courts of equity relieve against securities taken by an attorney from his client will apply to an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past and future services, was to be paid £25,000 after the death of the latter: and it was the opinion of the vice-chancellor of England that such a transaction was void at *law*, for it held out a direct premium to the medical adviser to accelerate that death upon the happening of which he was to have £25,000. "I ought," said his Honour, "at once to set my face against a transaction which is fraught with all the mischief that this court can ever set itself to prevent in the case of solicitor and client; and if a case were to arise before me (although there be no positive decision upon the subject) where I should find that a clergyman, or any person in the habit of imparting religious instruction, had taken from a person who placed confidence in him a security similar to that in the present case, I should not require to have quoted to me an exact precedent, but I should be guided by the principle on which the court acts in cases between client and solicitor."^x

^x *Dent v. Bennett*, 7 Sim. 546.—The judgment in this case was confirmed by Lord Cottenham upon appeal (4 My. and C. 269); wherein his Lordship, in referring to the vice-chancellor's opinion as to the illegality of the agreement in point of law, said he should abstain from stating anything upon that subject, but put it simply upon the doctrine laid down by Lord Eldon in *Gibson v. Jeyes* (6 Ves. 266),—"that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous;" but that, in the case before him, so far from the defendant having succeeded in so doing, the evidence proved the reverse.

The same principle holds equally good where parties stand towards

Such a case, however, as the one alluded to by the vice-chancellor, did shortly afterwards occur: it was where a Roman Catholic clergyman acted as spiritual adviser to the testator, and, taking advantage of that situation, became the agent and manager of the testator's temporal affairs, and, while holding those opposite characters, became also donee of very large gifts under the testator's will. The court considered that these were very strong grounds made out for inquiring as to undue influence, without determining what the result of the investigation might be.^y

Also, where a person had acquired great influence over the mind of a lady of weak intellect, to whom he stood as spiritual adviser, and had induced her to assign over to him the whole of her fortune, by persuading her and others that he sustained a supernatural character, the court set aside the gift in favour of her next of kin.^z

The same motives of public policy, which induce the court to throw its protection around the interest of the *cestui que* trust, especially if he be an infant, operate also in the case of *guardian* and *ward*, and will allow no transaction between them, tending to a suspicion of undue influence, which the guardian might exercise for his own benefit over his ward, immediately upon his coming of age,^a and at the time of settling the account. And, after the relationship between guardian and ward has legally ceased, the court will interfere to protect the ward from

Influence of guardian over his ward jealously watched by the court, after the legal relationship of guardian and ward has ceased.

each other in the relative position of tutor and pupil, notwithstanding the latter be upwards of twenty-one years of age.—*Peacock v. Ker-*
not, 1 Verulam, Real Prop. Rep. 199.

^y *Middleton v. Sherburne*, 4 You. and Coll., Eq. Ex. Ca. 378.

^z *Nottidge v. Prince*, 2 Giff. 264; 6 Jur. N. S. 1066; 29 Law Journ., Chan. 857.

^a 1 Ball and Bea. 230.

CHAP. III.

Archer v.
Hudson.

acts done by him on behalf of the guardian, where, from circumstances, the moral influence may be reasonably presumed to have continued. Thus, in *Archer v. Hudson*,^b before the lord chancellor, upon appeal, in March, 1846, a young lady, of the name of Kendray, being left an orphan at the age of nine years, and entitled to some property, resided with her uncle and aunt from the time she left school till she attained the age of twenty-one years: these relatives continued to exercise the control and authority of parents over her. The uncle, a Mr. Daniel, was a tradesman in the town where they lived. In the month of July, 1837, Daniel had overdrawn his bankers; and in November following, he having applied to them for a further advance, a Mr. Hawkswell, one of the firm, between whom and Daniel there existed an intimacy, promised to make him an advance, provided his niece, Miss Kendray, joined him as a security in a promissory note for £500. This young lady came of age on the 8th of November, in the same year; and, it being arranged that Hawkswell should call at Daniel's house, to obtain his niece's signature, it was stated that he (Hawkswell) fully explained to her the nature of the instrument and her liability in respect to it. The note was signed, and the bank still went on making advances to Daniel till 1842, when he failed. Miss Kendray had, in the meantime, married the plaintiff, Archer; and, the banking firm having commenced legal proceedings against him and his wife upon the note, they filed their bill, and the master of the rolls granted a perpetual injunction against the action. The decree being appealed from, the lord chancellor, after making some remarks upon the facts of the case, and the general doctrine of the court, said that it was not necessary in such cases that the

^b 7 Bea. 551; S. C. on appeal, 15 Law Journ. N.S., Chan. 211; 7 Law Times, 105.

relation of guardian, as nominated by the parent, or appointed by the Court of Chancery, should actually subsist towards the young persons; it is quite enough if they have lived with, or are under the control or influence of, a near relative. The Lord Chancellor (Lyndhurst) very properly observed that Daniel, as the uncle of the young lady, was the person to whom she would naturally look for advice, in the event of her requiring it. "If any other person," continued his Lordship, "had made to her a similar proposition, namely, to join in a promissory note of £500, without any consideration, and she had appealed to her uncle for advice in the matter, it would have been his duty, as a cautious and prudent man, to have explained to her the nature and consequences of such a transaction, and to have dissuaded her from the act, because her property might ultimately become liable for the payment of the note. If such is the advice the uncle ought to have given her in the case of a third person, how can he now, after having induced her to such an act for himself, expect that it can be maintained?"

The general features of *Maitland v. Irving*^c were so similar to the above-mentioned case, and the circumstances involved in it so like in principle, as, at first sight, to appear to be one and the same. It came before the vice-chancellor of England about six months after that case had been heard upon appeal. In *Maitland v. Irving*, the plaintiff, a young lady who had been a ward of court, was entitled to a very large fortune, and had resided with her guardian, Donald Maclean, one of the defendants, who was also her uncle by marriage, until the month of September, 1844, when she came of age, and still continued to reside with him. By reason of certain transactions in which the uncle was involved with the other defendants, Miss Maitland was induced to give a guarantee

*Maitland v.
Irving.*

^c 10 Jur. 1025; 8 Law Times, 312.

CHAP. III. on behalf of her uncle, and afterwards, in April, 1846, to exchange the guarantee for certain promissory notes. The defendant D. Maclean having, as is usual in such cases, failed to make good his obligations to his co-defendants, they commenced proceedings at law against him and the plaintiff, his late ward; but the court allowed an injunction to restrain the action. His honour conceived it to have been an imperative duty for the creditors, looking at the circumstances under which the young lady was placed with regard to her uncle, to have clearly ascertained the fact whether she were really, and in every respect, a free agent, and perfectly willing, with a full knowledge of all the facts, to do that which the quondam guardian had told them he would invite her to do.

Nevertheless, when the ward has arrived at full age, and has entered into possession of his estate, and the relationship no longer exists, and all undue influence can be fairly presumed to be removed, there is no objection to his making the guardian some pecuniary acknowledgment for past care, attention, and services.^d

Expectant heirs protected by the court.

Expectant heirs are equally protected by equity against all the world, in dealing with their expectancies, as are *cestui que* trusts against the purchase of their estate by trustees; and, if a suit be commenced, it will lie on the purchaser to show that the transaction was a fair and *bonâ fide* one.^e

Inadequacy of consideration.

The court will, also, in favour of young heirs, set aside the sale of an expectancy, on the ground of inadequacy of consideration.^f The inadequacy of the consideration

^d Dawson v. Massey, 1 Ball and Bea. 219; Wright v. Proud, 13 Ves. 138.

^e Coles v. Trecothick, 9 Ves. 246.

^f Twistleton v. Griffith, 1 P. Wms. 310; Gowland v. D. Farie, 7 Ves. 20. Vide Lord Aldborough v. Tyre, 7 Cl. and Fin. 457; and the observations of Lord Cottenham in that case.

is considered with reference to the time of the contract, and not to the event itself; and the burden of proof in such cases is thrown upon the *purchaser*, to show that a full and sufficient consideration was paid:^g although, as between man and man, equity will not interfere, unless the price given be so grossly inadequate as would amount to an evidence of fraud. And it seems that equity will not, where the terms of the contract appear to be unconscionable, take into consideration the risk which the vendee runs from the uncertainty or remoteness of the interest, and the danger he incurs of losing his money should the heir-expectant die before he comes into possession of the estate; nor will the fact of the heir being unprovided for avail much in the purchaser's favour.

CHAP. III.

What amounts to inadequacy in ordinary cases.

The principal motives which lead the court to discourage the sales of reversions by heirs are—1, That it opens a door to take an undue advantage of an heir in distressed and needy circumstances; 2, That, if there were no controlling power, a young heir might be induced to shake off his father's authority, and feed his extravagancies by disposing of the family estate. The former may be considered as a private reason; the latter is founded on public policy.^h These considerations, however, do not apply where the father, tenant for life, and his son, tenant in tail in remainder, concur in the sale; for the two, having in them but one inheritance, and forming but one vendor, having a present interest, meet the purchaser with the same advantage as if a single person had in himself the power over the whole estate.ⁱ

Reasons for discountenancing reversionary interests;

It may be laid down as an indisputable proposition that in any age or country, wherever extravagant and dissi-

^g Sug. V. and P. *Bromley v. Smith*, and *Boustead v. Bromley*, 26 Bea. 644; 29 Law Journ. Chan. 18.

^h Sug. V. and P. *Earl of Chesterfield v. Janssen*, 2 Ves. 125.

ⁱ *Wood v. Abrey*, 3 Madd. 422; *Wardle v. Carter*, 7 Sim. 490.

CHAP. III.

Lord Bacon's observation upon the subject.

pated young gentlemen are to be found, there will be no lack of commercial harpies, ever ready to supply their demands by a timely accommodation in the way of loan, at the usual rate of ruinous interest. This seems to have been particularly felt in the days of Lord Bacon, and to have induced an impression on his mind as to the necessity of a Parliamentary interference to check the vicious system adopted to evade the laws of usury; for after the death of that great man, there was found among his manuscripts a paper writing, intituled "Draught of an Act against an usurious shift of gain in delivery of commodities instead of money," made by his Lordship. Its preamble is somewhat curious, as unfolding the system of roguery and fraud which was had recourse to by money-lenders in those days; showing that the modern race of usurers have but little improved upon their progenitors either in conscience or morality:—"Whereas, it is a usual practice to the undoing and overthrowing many young gentlemen and others, that, when men are in necessitie and desire to borrow money, they are answered that money cannot be had, but that they may have commodities sold unto them upon credit, whereof they may make money as they can; in which course it ever comes to pass, not only that such commodities are bought at extreme high rates and sold again far under foot to a double loss, but also that the party which is to borrow is wrapped in bonds and counter-bonds: so that upon a little money which he receiveth, he is subject to penalties and suits of great value. Be it therefore enacted, by the authority of this Parliament, etc. And that all bonds and assurances whatever made for that purpose, directly or indirectly, shall be utterly void."^j

To what extent the court ope-

When the assistance of the court is necessary to set aside a usurious contract, it will yield its aid only so far

^j Law Tracts, 278.

as that justice may be done to both parties; and this is effected, not by causing the defendant to lose his principal as well as interest, but, following the maxim of equity, that he who asks for justice must do justice, will impose upon the plaintiff the terms of paying what is fairly due, with legal interest.^k

CHAP. III.
rates upon
a usurious
bargain.

Under the branch of the equitable jurisdiction *for the prevention of fraud* are classed *injunctions*; which are *prohibitory writs* granted at the discretion of the court, according to the nature of the case, against one or more parties to the suit. It must be specially prayed for by the bill in which the plaintiff's title is set forth, and cannot be included in the prayer for general relief.^l

Until lately the granting an injunction belonged exclusively to the Court of Chancery; but by several Acts of Parliament hereinafter mentioned, a concurrent jurisdiction is given to the courts of common law in certain cases for granting injunctions. Thus by the 15 & 16 Vict. c. 83, s. 42, it is enacted that in any action in any of the superior courts at Westminster for the infringement of letters-patent, the court in which such action is pending, or a judge thereof, may make such order for an injunction, inspection, or account as to such judge or court may seem fit. By the 17 & 18 Vict. c. 31, s. 3, "The Railway and Canal Traffic Act," a provision is made for any person complaining against any company for anything done in contravention of the Act to apply to the Court of Common Pleas to hear the matter of complaint and to issue a writ of injunction, or such violation or contravention of the Act, and enjoining obedience to the same. By the Common Law Procedure Act, 1854, s. 82, in all cases of breaches of contract where the plaintiff has

^k Scott v. Nesbit, 2 Bro. 641; S. C., 2 Cox, 183.

^l Amb. 70; 1 Ves. and B. 314.

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For what
purpose
granted.

commenced his action, he may apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant from the repetition or continuance of the wrongful act or breach of contract, and in every case of disobedience, such writ may be enforced by attachment by the court, or when the court shall not be sitting, by a judge.

The most usual purposes for granting injunctions are the following:—1, To stay proceedings in other courts of judicature; 2, To stay waste; 3, To restrain the infringement of patents; 4, To prevent the sale of books, printed music, or prints; 5, To restrain the negotiation of bills of exchange or other securities; 6, To prevent the committing of nuisances.

The court will not grant an injunction where the title to relief in equity depends upon a legal right, except only in those cases where it appears in what way the rights of all parties may be best protected.^m

It is necessary, in almost all cases, for the purpose of obtaining a writ of injunction, that the bill should be filed; since without the institution of a suit and prayer of process, there is nothing whereon to ground the injunction:ⁿ there are, however, exceptions to the general rule;^o and the writ must not only be asked for in the prayer for relief, but also in the prayer of process.^p

The court never grants an injunction unless for the sake of preventing immediate injury at the time, and there must also then be proof of its necessity; but in no case of future possible injury does it interfere.^q

^m *Rigby v. Great Western Railway Company*, 10 Jur. 531.

ⁿ *Savory v. Dyer*, Amb. 70.

^o *Wright v. Atkins*, 1 Ves. and B. 313; *Casmajor v. Strode*, 1 Sim. and S.

^p 3 Sim. 273.

^q *Maxwell v. Ditchburn*, 5 Law Times, 405.

Formerly, whenever the bill for an injunction prayed that proceedings at law might be stayed,* the injunction was granted, of course, without a notice and without an affidavit of merits (unless the defendant were abroad), immediately,^r *for want of appearance or answer*; or, if the answer was filed, upon the matter therein confessed; and sometimes upon the special circumstances of the case. If the defendant happened to be in contempt for not having appeared, the plaintiff's solicitor, on affidavit of service of subpoena, might, on motion or petition, have moved, as of course, for the injunction. But now, the 45th Order, 7th August, 1852, and 25 Cons. Or., founded on the 58th section of the 15 & 16 Vict. c. 86, for the reasons hereinafter stated, direct that no injunction for stay of proceedings at law is to be granted, as of course, for want of appearance or answer to the bill.

Upon the coming in of the defendant's answer within the time prescribed, and he not being in contempt, the plaintiff's right to the injunction depends upon the merits disclosed in the defendant's answer. In this case the plaintiff must serve the defendant's solicitor with a *special* notice of motion for the injunction, and the plaintiff's right to the injunction is argued in court upon the coming on of the motion. Where there are two or three defendants to a bill for injunction, against whom it has been obtained, the injunction will not be dissolved till all have answered.^s Sometimes, even under the former practice, in very pressing cases, the court would allow a *special* injunction to restrain proceedings *at law*, although the defendant was neither in default for want of appearance nor

After answer the injunction will either be dissolved or continued, according to the merits.

* Before the 15 & 16 Vict. c. 86, an injunction to stay process at law was called emphatically the *common* injunction. All the rest were known as *special* injunctions. See s. 58 of the Act.

^r 2 Meriv. 474.

^s Barn. 354.

CHAP. III. — for not filing his answer—as where a judgment has been entered up upon a warrant of attorney—so that, with all due diligence, the party could not have obtained the common injunction in time.^t

If it be wished to stay the trial of the action at law as well as execution, it must be done by a separate motion, as an injunction to stay execution and trial cannot be granted on one motion.^u The motion must be supported by affidavit, stating that the plaintiff cannot with safety proceed to trial of the action until the defendant's answer be put in; and that he verily believes the answer will produce a discovery material to the just trial of the action: and the affidavit must be made by the plaintiff unless a sufficient reason appear why he does not make it.^v

Effect of the common injunction, in reference to the state of the action at law.

The effect of the injunction to restrain proceedings at law is,—that, if upon service thereof the defendant in equity has not commenced his action at law, he cannot sue out process;—if he have done so, and not yet delivered or filed his declaration, it restrains all further proceeding. But, if there have been any declaration filed or delivered, it only restrains execution; and all mesne proceedings may be had by such defendant in Chancery, as demanding a plea; and, for want of such plea, signing judgment: or the cause being at issue, he may go to trial, obtain a verdict, and thence proceed to judgment.^w If judgment be executed, and the debt and costs levied thereon, the sheriff cannot pay the money over to the defendant, but he may be ordered to pay the money into court.

Why equity

The grounds upon which equity has interposed to re-

^t *Annersley v. Rocke*, cit. in *Franklyn v. Thomas*, 3 Meriv. 266.

^u *Wright v. Braine*, 3 Bro. C. C. 87.

^v *Spalding v. Keely*, 7 Sim. 377.

^w *Bishton v. Birch*, 2 Ves. and Bea. 41; *Earnshaw v. Thornhill*, 18 Ves. 488.

strain actions in courts of ordinary jurisdiction are,— CHAP. III.
 that a party by fraud or accident may frequently have an interposes
to restrain
actions at
law.
 advantage in proceeding in these courts, which must necessarily make them instruments of injustice; and it is against conscience that he should use that advantage to the prejudice of another.^x Therefore, when the Court of Chancery interferes to restrain proceedings at law, it is not out of any assumption of supremacy over the ordinary tribunals, but in respect of its jurisdiction as a court of equity, whereby it controls the *party* and not the *court*, from proceeding at law. Equity, in these cases, without denying the jurisdiction of the common-law courts, proceeds upon this principle, namely, that the party is making use of that jurisdiction contrary to equity and conscience; and in this respect the injunction differs from a *mandamus* and a *prohibition*, the latter being directed to a court or a public officer, and not to a private individual.

Perhaps no principle inherent in the Court of Chancery is exercised for a more beneficial purpose than when the extraordinary jurisdiction of that court is invoked to restrain a vexatious action at common law; in which case, as before remarked, the Court of Chancery does not assume so much the right to interfere with the process of another tribunal, as it does with the person making an unconscientious and oppressive use of its jurisdiction; and, whenever such an instance really does occur, the interference of the Court of Chancery is productive of a most salutary result: but, like all other provisions of a remedial character, this equitable restraint until lately became liable to the most glaring abuse; for, as we have seen, the common injunction was had upon default of appearance or answer, and as the bill was not put in upon oath, great hardship was frequently inflicted upon the plaintiff in the

Advantages
and disad-
vantages of
the common
injunction.

^x Mitf. Tr. Pl.; 1 Madd. Ch. 182.

CHAP. III. — course of his action; for the statements in the bill not having been put in upon oath, were made to contain a long list of imaginary or fictitious grievances, utterly inconsistent with the truth, in order to give colour for the interference of a Court of Chancery. Indeed, Lord Cottenham, C., in a recent case, seems to have been fully sensible of the hardship, and thought that, where there existed any doubt respecting the validity of the legal right, the court ought to be extremely guarded in exercising its power of interfering by injunction. "There are two reasons," said his Lordship, "why this power of the Court ought not to be lightly put into motion: the first is, that if it turn out that the applicant's legal title should fail, the court would have interfered without any necessity; and the second, and principal reason, is, that there is no comparison in the mischief that might result with the granting and withholding the injunction. The measure of injury which the plaintiff might sustain for the non-interference of the court could not be equal to that which the defendant might suffer from the granting of an injunction which could not afterwards be sustained; the more so, as in the one case the damage done might be ascertained and recovered, but not so in the other."^y The chancery commissioners being pressed with a consciousness of the mischievous results of such a practice, recommended for remedy the provision in the 58th section of the 15 & 16 Vict. c. 86, which enacts that the practice of the Court of Chancery with respect to injunctions for the stay of proceedings at law shall, so far as the nature of the case will admit, be assimilated to the practice of such court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications supported by affidavit in like manner as other special injunctions are granted by the court.

^y *Electric Telegraph Company v. Nott*, 8 Law Times, 530.

Every application therefore for an injunction before answer, except in an interpleader suit, is supported by an affidavit of merits verifying the material statements of the bill; so that where the plaintiff had forgotten a material fact when he made an application for the injunction, and so stated on his oath in answer to a motion to dissolve, his defect of memory was held to be no excuse, otherwise the same excuse might prevail in every case, and the court expects that no material fact should be suppressed.^z

As soon as the bill is filed, the plaintiff in equity, by means of a strong affidavit of oppression and irremediable mischief (unless the court should interfere to prevent it) may obtain an *ex parte* injunction against the defendant (the plaintiff in the action at law), to dissolve which the defendant must appear to the bill and file his answer, containing such a case as will give him a chance of moving on the coming in of the answer successfully to dissolve the injunction.

The court will not grant an injunction against a creditor unless there exists a decree under which he has a present right to come in and prove his debt.^a And even where a decree has been obtained in an administration suit, an injunction will not be granted to restrain a creditor from pursuing his legal remedy without an affidavit from the executor as to the amount of assets in his hands.^b But when the executor has so admitted assets in his answer, the injunction will be granted upon the terms of the executor paying the money into court upon motion.^c

2. *Special injunctions* are granted in cases where an Special

^z Clifton *v.* Robinson, 16 Beav. 355.

^a Ranken *v.* Harwood, 5 Hare, 215; 2 Ph. 22; Lee *v.* Park, 1 Kee. 714.

^b Cleverly *v.* Cleverly, 8 Ves. 521; Dan. Ch. Pr. 1489.

^c Gilpin *v.* Lady Southampton, 18 Ves. 469.

CHAP. III. extensive injury is about to be inflicted upon the *property*
injunctions; of another.

when
granted.

When the grievance sought to be prevented by injunction is of so urgent and pressing a nature, that irreparable mischief would ensue if the plaintiff were bound to wait until the defendant's answer be put in, as where the plaintiff seeks to stay waste, or other cases of an analogous nature, the injunction may be applied for upon certificate of the bill being filed, accompanied by an affidavit verifying the statements contained in the bill, before appearance, or without notice of motion;^d provided the plaintiff make an early application to the court after the injury has happened. If, however, the defendant has appeared, a notice of motion is in general necessary;^e but in special cases, in the nature of waste, the court will sometimes, upon an *ex parte* application, even after appearance, allow an injunction, although, in such instances the appearance must be stated.^f Where, however, the grievance is less urgent, the court will grant an injunction before answer, but will require notice of motion to be served on the defendant. The affidavit above-mentioned is usually made by one of the plaintiffs, but may be sworn to by any person acquainted with the facts. It must not however be sworn until the bill has been filed.^g

To avoid any delay which might otherwise happen by the new practice of printing bills under the 15 & 16 Vict. c. 86. s. 1, it is provided by section 6, that the clerk of the records and writs may receive and file a written copy of any bill of complaint praying a writ of injunction. (Appendix A, *Injunction*.)

^d Amb. 66.

^e Perry *v.* Weller, 3 Russ. 519.

^f 3 Meriv. 1; Petley *v.* Eastern Counties Railway Company, 8 Sim. 483.

^g Ayck. Ch. Pr. 220.

The court deals with greater strictness and severity with persons applying for *ex parte* injunctions than when obtained on notice, for a very obvious reason. Since the former being applied for in the absence of those against whom it is sought, might put them to a very serious inconvenience by obtaining a temporary injunction, and therefore the party applying is bound to put the court in possession of all the facts to enable it to judge whether the defendant ought or ought not to be placed in that position. But when it is obtained upon notice, the opposite party has an opportunity of bringing forward every circumstance favourable to his case.^h

A special injunction may be applied for at any stage of the proceedings and may be obtained in vacation as well as in term time, whether the court be actually sitting or not, the court being always considered as open;ⁱ but if the injunction be applied for in the long vacation after the court has risen, the plaintiff, instead of *moving*, should present a *petition* for the injunction, which petition should contain the substance of the bill supported by affidavit.

As soon as the court has ordered the injunction, the plaintiff must obtain the writ under the seal of the court, and should be diligent in serving it; which is done by showing the party against whom it is issued the writ itself, and delivering him personally a true copy thereof. If the matter be very urgent, the plaintiff may serve the parties enjoined with a notice in writing, stating that an injunction has been granted, and that it will be sealed and served as soon as it can be passed, or he may serve the defendant personally with a copy of the minutes of the order signed by the registrar, at the same time showing the original. The plaintiff, however, must lose no

Special
injunction,
obtained
either during
term time or
in the
vacation.

Writ of
injunction.

^h Maclaren v. Stainton, 16 Beav. 290.

ⁱ Temple v. Bank of England, 6 Ves. 771.

CHAP. III. time in serving the injunction.^j If the defendant reside abroad, and the injunction is to restrain proceedings at law, the court will allow service on his attorney or solicitor. Where a special injunction has been granted, and the party against whom it issues absconds, service at the house which appeared to be the last place of his abode has been held to be sufficient.^k

Common
injunction;
how
dissolved.

The injunction, whether to restrain proceedings at law or a special injunction is now granted until further order of the court, or until the hearing of the cause (Seton's Or. and Dec. 2nd edit. 453). The defendant having answered, could not have moved to dissolve the *common* injunction, to restrain proceedings at law, except upon orders *nisi* and *absolute*; but now it would seem that the notice of motion to dissolve the injunction must be served in the usual way.^l

Cause
against
dissolving.

On the day for showing cause against dissolving the injunction, the plaintiff may either show cause by excepting to the sufficiency of the answer, or procure the opinion of the court for scandal, or upon merits disclosed in the answer, why the injunction should not be dissolved at the next motion day.

If the plaintiff, after undertaking to show cause upon the merits against dissolving the injunction, should fail therein, the injunction is dissolved, and exceptions cannot be shown as a cause.^m

Judgment of
court as to
insufficiency
of answer to
injunction-
bill.

If the plaintiff offer exceptions to the sufficiency of the answer, as cause against dissolving the injunction, he is to obtain the decision of the court thereon, within four

^j Van Sandall v. Rose, 2 J. & W. 264.

^k 5 Ves. 147; 14 Ves. 205.

^l Normanville v. Stanning, 10 Hare, App. 26; Pinchin v. Blackwall Railway Company, 3 W. R. 52-125.

^m Harcourt v. Ramsbottom, 3 Swan. 362.

days after the date of the order, to refer them, or in default thereof, the injunction to stand dissolved.ⁿ CHAP. III.

An injunction may be dissolved, either by the defendant filing an affidavit against the plaintiff's case before answer, or upon the answer coming in, by a *notice of motion* upon the merits contained therein. Injunction;
how
dissolved.

Under the powers of the 21 & 22 Vict. c. 27, the following jurisdiction, which was formerly confined to courts of law in respect to the remedy in cases of injunction was extended to the courts of equity, namely, a power to award damages to the party injured, on an application for an injunction against a breach of any covenant, contract, or agreement, or the commission or continuance of any wrongful act, or the specific performance of any covenant, contract, or agreement, and either in addition to, or in substitution for such injunction or specific performance. A power also is given to assess such damages, or to try any fact arising in any suit or proceeding either by the court itself or by a jury.

3. An injunction to stay *waste* is in the power of the courts of equity to grant, and, on account of its greater practical utility, it supersedes the common-law remedy of a *preventive* nature called the writ of *estrepement*, which lay after a judgment obtained in a real action before possession delivered by the sheriff, to prevent the defendant from committing waste in the lands recovered. The Statute of Gloucester added another writ, to prevent the defendant from committing waste *during the suit*, denominated the writ of *estrepement pendente placito*. To stay
waste.

This writ, however, has been abolished by the statute 3 & 4 Will. IV. c. 27, s. 36, and the suitor is now driven to the less formal and tedious, though more effectual, method of proceeding by bill for an injunction, which Stat. 3 & 4
Will. IV.,
c. 27.

ⁿ Goodinge v. Woodhouse, 14 Ves. 534.

CHAP. III. will be granted either upon a mere threat to commit waste, or where the party is in the act of committing it, and for an *account* of so much waste as may have been done already. This at once prevents the commission of *future waste*, and compels, by a decree, compensation for the past.^o

Waste ;
voluntary
and per-
missive.

Waste is that which does a lasting injury to the freehold or inheritance, and consists of two kinds—*voluntary* and *permissive*. The former is the spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder in fee-simple, or fee-tail.^p The latter is that which is the consequence of omission only, as where the tenant suffers a house to fall down for want of necessary repairs. An injunction will issue for permissive as well as voluntary waste.^q

In whom
punishable
at common
law.

By the common law, waste was punishable in three persons only—guardian in chivalry, tenant in dower, and tenant by curtesy, and not in a tenant for life or years. The reason assigned is, that the three former were created by act of law itself, which provided its own remedy against them ; but the tenant for life or years coming in under demise and lease of the owner of the fee, the latter had the liberty of providing against committal of waste if he chose, and if he did not, it was his own default.^{r*}

The statutes of Marlbridge, 52 Hen. III. c. 23, and of Gloucester, 6 Edw. I. c. 5, afterwards extended the writ of waste against farmers or other persons who held as tenants for life or tenants for years.

^o Eden on Injunc. 160.

^p Co. Litt. 53 (a).

^q Caldwell v. Baylis, 2 Meriv. 408.

^r Bl. b. ii. 282.

* The reason why the common law allowed so large a power to a tenant for life, "without impeachment of waste," was for the interest

By the Statute of Marlbridge, as well as by the common law, the punishment for waste was only single damages, except in the case of a guardian, who also forfeited his wardship, 9 Hen. III. c. 4; but the Statute of Gloucester directed that the tenant should forfeit the thing or place wasted, and also triple damages.

CHAP. III.
Statutes of
Marlbridge
and
Gloucester;

Under this statute it has been held that where there are two joint tenants for life or years, and one of them commits waste, this shall be deemed waste by them both as to the place wasted; but triple damages shall be recovered only against the person who actually committed the waste.^s

It was for some time contended that, under the Statute of Marlbridge, a tenant for life *absque impetitione vasti*, or without impeachment of waste, was not only at liberty to commit waste by felling timber, but also to apply the timber for his own use—such a tenant being thereby invested with a full power of cutting down timber and opening new mines for his own use, as if he had an estate of inheritance, and also of taking the timber if severed by others.^t Experience soon discovered the prejudicial and mischievous consequences resulting to the inheritance by so unrestrained a licence; therefore, although by the clause “without impeachment of waste,” a tenant for life may commit waste for his own benefit, by cutting timber in a husbandlike manner, and opening mines and doing other acts of waste,^u yet, to prevent an uncon-

Effect of.

of the public, as timber might thereby circulate for shipping and other uses.—Packington’s case, East. term, 1744, 3 Atk. 216.

^s 2 Inst. 302.

^t 1 T. R. 56; Harg. Co. Lett. 220.

^u Lewis Bowle’s case, 11 Rep. 82 (b); Burgess v. Lamb, 16 Ves. 185; Cholmeley v. Paxton, 3 Bing. 211; Davis v. Wescomb, 2 Sim. 425; Woolf v. Hill, 2 Swans. 149; Waldo v. Waldo, 12 Sim. 107; Phillips v. Barlow, 4 Law Times, 130; S. C., Verulam, Real Prop. Rep. i. 148.

CHAP. III. scientious use of that power, the Court of Chancery will enjoin him from making *spoil* and *destruction* on the estate.^v And it was said by Lord Nottingham, in another case,^w that if a tenant for life commit waste *maliciously*, equity will restrain him, though he had express power to commit waste.

The three general heads into which waste affecting the inheritance has been divided, are—1, in land; 2, in timber; 3, in houses; for the particulars of each, the reader is referred to Blackstone's Commentaries,^x or Eden on Injunctions,^y where the whole subject is summed up by each author with accuracy and precision.

Equitable
waste.

Equitable waste is such as the *law* does not regard as waste, and for which, therefore, the legal tribunals afford no remedy; but which a court of equity esteems as waste, by reason of the manifest injury to the inheritance, although not inconsistent with the legal rights of the party committing it. Thus, where a tenant for life, *without impeachment of waste*, pulls down houses, and commits other wanton or malicious acts of waste, equity will restrain him *pro bono publico*.^z In the case, also, of a tenant in tail, after possibility of issue extinct, who is abusing his rights in a wanton and unconscientious manner, so as to inflict an injury upon the claims of other persons; he will be restrained from doing so, even though the act of waste should not extend to the absolute destruction of the estate, but in capriciously cutting down trees planted for the ornament or shelter of the premises.^a

^v 2 Vern. 738.

^w Abraham v. Buff, 2 Eq. Ab. 757; 2 Freem. 53.

^x Bl. ii. 28.

^y Ch. 8.

^z Abraham v. Bubb, 2 Freem. Ch. Rep. 53; Aston v. Aston, 1 Vern. 265; Lord Barnard's case, Pre. Ch. 454; S. C., 2 Vern. 738.

^a Marquis of Devonshire v. Sandys, 6 Ves. 107; Lord Tamworth v. Lord Ferrers, 6 Ves. 419; Burgess v. Lamb, 6 Ves. 185; Day v.

The cases in which the court of equity originally inter-
 fered to restrain waste were confined to privity of title;
 but its jurisdiction became gradually enlarged, to meet
 the claims of adverse rights, not founded in privity of in-
 terest, such as the case of trespass accompanied with
 irreparable mischief. This interference is extended to
 cases in which the law affords but an imperfect remedy,
 or where it is wholly denied; and whenever a preventive
 and permanent remedy is indispensable against a wanton
 and capricious abuse of their legal rights and authorities,
 by persons having only a temporary and limited interest
 in the subject-matter.^b

CHAP. III.

Cases of
equitable
interference.

And the court, in any of the above cases of equitable
 waste, will not only restrain the party from committing
 further waste, but will direct an account of the waste
 done, and will not suffer the individual to pocket the pro-
 duce of the wrong, but will direct the money produced
 by such waste to be laid up for the benefit of those who
 succeed to the estate; and the remedy extends to the
 representative of a deceased tenant for life, without im-
 peachment.^c In the case referred to, Sir John Leach,
 V.C., said that the restraint upon the legal owner, as to
 equitable waste, was to be considered as founded on a
 breach of that trust and confidence which the deviser re-
 posed in the tenant for life, that he would use his legal
 estate only for the purpose of fair enjoyment; that it was
 a trust in equity from the subsequent limitations, and
 from the presumed intention of the testator, that he
 meant an equal benefit to all in succession.

How far
the court
proceeds in
equitable
waste.

4. We now come to speak of *injunctions* to restrain

Infringe-

Merry, 16 Ves. 375; Attorney-General v. Duke of Marlborough,
 3 Madd. Rep. 539.

^b Story's Eq. Jur. ii. s. 918; Marquis of Lansdowne v. Marchioness
 of Lansdowne, 1 Madd. Rep. 136.

^c Ormonde v. Ormonde, 5 Madd. Rep. 369.

CHAP. III.

ment of
patents,
restrained
by injunc-
tion.

the *infringement of patents*. A patent is said by Mr. Stephens (Bl. Comm. 2, 86) to be a privilege granted by the crown to the first inventor of any new contrivance in the manufactures, that he alone shall be entitled, during a limited period, to make articles according to his own invention. Patents were formerly looked upon with great jealousy, as being injurious monopolies; but are now regarded as beneficial to the public, by holding out inducements for the ingenuity and industry of inventive and intelligent men to exert themselves in promoting the cause of science, by disclosing the result of their labours for the benefit of mankind. Patents have been represented as bargains between the inventors and the public, to be judged of on the principles of keeping good faith, by making a fair disclosure of the invention, and to be construed as other bargains.^d

Patent; an
act of royal
favour.

The grant of a patent right is not to be considered as proceeding *ex debito justitiæ*, but as a pure act of royal favour. It must be a *novelty*, as well as an article formed by the hand of man:^e so that if a patent be granted for an article already known to the public in this country—whether the first discoverer were cognizant of it or not at the time he obtained his patent—the grant will be void;^f but its having originated and been communicated in a foreign country will form no impediment to its being valid here, for it will answer the words and intent of the Act, provided it be new within *this realm*.^g

Injunction
obtained, in
the first
instance, in
favour of an
old patent.

If a patentee has been for a long time since the grant of the patent in the uninterrupted and exclusive enjoyment thereof, a court of equity will allow an injunction

^d Cartwright v. Arnott, 11 East, 107; Harmer v. Plane, 14 Ves. 132.

^e King v. Wheeler, 2 B. and A. 350; Cornish v. Keene, 3 Bing. N. C. 570; Kay v. Marshall, 5 Bing. N. C. 492.

^f 10 Bar. and Cres. 22; 5 & 6 Will. IV. c. 82, s. 2.

^g 2 Salk. 447.

to issue against a person invading it, without putting the other party to try the validity of his patent by an issue at law;^h but when an injunction is sought against the violation of a patent, the plaintiff must, *at the time of applying*, depose to his belief that he is the original inventor: for although, as was observed by Lord Eldon, the party, when he obtained his patent, might very honestly have sworn as to his belief of such being the fact, yet information may have been communicated sufficient to convince him that it was not his original invention, and that he was under a mistake when he made his previous declaration to that effect. It sometimes happens that a patentee applies for an extended term for the exclusive use of his patent, and this is anything but as a matter of course, since in order to obtain it a very special case must be made out; that the novelty, merit, and utility of the invention must be proved, and it must be shown that all reasonable means have been used in order to make the invention productive; but that in spite of such exertions the remuneration by the inventor has entirely failed or has been quite disproportioned to his merits and the benefits conferred upon the public. And such a grant will be deemed a new grant by letters-patent, subject to the same conditions, open to the same objections, and generally entitled to the same advantages as the original grant.ⁱ

The intervention of a court of equity in the piracy of copyrights or the infringement of patents is necessary, to finally establish the rights of the injured party; since, if no other remedy were given him, except the imperfect one afforded by an action at law, he might be ruined by the necessity of perpetual litigation.^j In such cases, un-

The intervention of the Court of Chancery; why necessary in the infringement of patents, etc.

^h Hill v. Thompson, 3 Meriv. 624.

ⁱ Re Honiball's Patent, by appeal to Privy Council, 25 Law Times, 1.

^j Harmer v. Plane, 14 Ves. 132; 8 Ves. 223; Jac. 472; 5 Russ. 322.

CHAP. III. less there could be a discovery from the guilty party (such as a court of equity can only afford) as to the extent of the injury committed, it would be impossible to ascertain the amount by any other means ; for, in the case of a copyright, not only is the sale of copies by the defendant robbing from the author the profit upon the individual book, but may prove incalculably injurious to him in respect to the value and disposition of his copyright, which no inquiry for the purpose of giving damages could fully ascertain.^k Moreover, the preventive remedy, which the peculiar constitution of the equitable jurisprudence enables it to afford for the purposes of justice, renders it the only proper tribunal in matters of this kind ; since the courts of law have no power to restrain the defendant from the future use of the plaintiff's invention nor the future publication of his work ; neither can they prevent the defendant from so doing pending the action. In addition to this superiority over the common law courts, a court of equity will, at the instance of the plaintiff, direct an account in the one case of the books printed, and in the other an account of the profits which may have arisen from the use of the invention from the pirating defendants.^l

Patent, not
granted for a
principle
merely.

There cannot be a patent granted for a *principle* merely ; but where the inventor claims the benefit of a principle connected with corporeal substances, or the benefit of certain mechanical combinations embodying that principle, so as thereby to produce effects in any art, trade, mystery, or manual operation, he may obtain a patent:^m but where the patent is of recent date, and an injunction is

^k Hogg v. Kirby, 8 Ves. 223-5 ; Wilks v. Aikin, 17 Ves. 424.

^l Mitf. by Jerem, 138 ; Eden on Injunc. c. 12, 261 ; Sheriff v. Coates, 1 Russ. and My. 159 ; Story's Eq. Jur. ii. 933.

^m Bolton v. Bull, 2 H. Bl. 463 ; Minter v. Wells, 1 C. M. and R. 505 ; Jupe v. Pratt, Webb's Patent Cases, 144.

sought to restrain the invasion of it, if the party infringing it endeavour to show that there is no good specification, or for any other reason the patent ought not to have been granted, the court will not act upon the presumed validity of the patent, before the patentee has established his right at law; and the injunction will be refused unless the plaintiff will swear, to his belief, that he was the original inventor, and will undertake to bring his action immediately. But where the right of the patentee appears on record, as under letters-patents for a new invention, it is not necessary for the plaintiff to establish his right at law, previous to his filing an injunction-bill in a court of equity;ⁿ and it has been said that possession under a colour of title is ground enough to enjoin and continue the injunction, till it is proved at law that it is only colour and not real title.^o

If, upon dissolving an injunction, and directing an issue at law, any matter of doubt present itself to the court as to the rights of the parties, it will sometimes order the defendant against whom the application is sought, to keep an account pending the trial of the issue, that the plaintiff, provided he establish his title at law, may be indemnified for the injury sustained by him on account of the invasion of his rights.

To prevent the sale of *books, printed music, or prints.* Books, printed music, or prints.
 —The principle upon which a court of equity proceeds in restraining by injunction the infringement of a copyright or sale of literary compositions, is stated by Lord Eldon to be, that damages at law do not give adequate relief. A copyright is the exclusive privilege which the law gives an author of printing and reprinting his own original literary labours.

The well known case of *Prince Albert v. Strange* re-

ⁿ Mitf. Pl. 147.

^o 6 Ves. 707; 14 Ves. 130.

CHAP. III. lates to the unpublished work of certain etchings which her Majesty and the Prince had made for their amusement. The plates were sent to a printer for the purpose of having a certain number of impressions taken from them for their own use. The defendant obtained possession, by purchase, of a number of impressions of the etchings from another person, with a knowledge at the time that the vendor had himself obtained such impressions through a breach of trust. The court, under the circumstances, granted an injunction, and ordered the impressions to be delivered up, without giving the defendant an opportunity of trying the question of property at law.^p And in the same case,^q it was also held, that the defendant, having submitted to the injunction, could not object to an injunction grounded on the application of the Prince alone, restraining the publication of a catalogue or description of the etchings, on the ground that it was too extensive, as not clearly identifying which of such etchings belonged exclusively to his Royal Highness.

Trade
marks.

Where there has been a palpable imitation of what are called *trade marks* to such an extent as to deceive purchasers, the court will interfere by injunction.^r And where one manufacturer has marked his goods with the known and accustomed mark of another manufacturer, so that the public are induced to believe the goods of the latter to be manufactured by the former, and there is the intention to deceive purchasers and to sell the fraudulently marked goods, an action on the case will lie.^s

^p Prince Albert v. Strange ; The Attorney-General v. Same, 13 Jur. 507 ; 13 Law Times, 341.

^q 13 Jur. 45, 109 ; 18 L. Jour. Ch. 120 ; 1 Macnaugh. and Gord. 25 ; 12 Law Times, 367, 441.

^r Edleston v. Vick, 18 Jur. Ch.

^s Rodgers v. Nowill, 5 C. B. 109.

When the question in dispute depends upon the effect of an agreement, the court will not interfere by injunction till the plaintiff's title has been established at law.^t

CHAP. III.
When necessary for plaintiff to establish his title at law.

The claims of authors to the exclusive enjoyment of their copyright, whether in books, musical composition, or prints; the property of all original sculptures, models, etc., or patterns for linen, cottons, etc., depended till lately upon a series of statutes from 8 Anne, c. 19, to 54 Geo. III. c. 23.

It has been decided that where the publication of a work is of such a nature as that the author could not maintain an action at law in reference to it, the court will not decree an account even upon submission in the answer.^u And if the publication of a work be *contra bonos mores*, and calculated to injure the public morals, as where it contains gross and libellous imputations, a jury would be directed to give no damages for pirating the copyright, and upon the same principle the court would refuse an injunction.

As to publications *contra bonos mores*.

Most of the cases of violating the copyright of a publication have arisen, not where a new work has been published as part of the old work, but where, under colour of a new work, the old one has been republished and copies multiplied.^v

Usual cases of violating copyright.

When the matter which forms the subject of the alleged piracy comprises but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years, the court will not grant an injunction, but will leave the plaintiff to his legal remedy.^w Although, where a bill is filed to restrain the publishing or selling a work

Case in which an injunction will not be allowed.

^t Walcot v. Walker, 7 Ves. 1.

^u Walcot v. Walker, 7 Ves. 1; Southey v. Sherwood, 2 Mer. 435.

^v Hogg v. Kirby, 8 Ves. 223.

^w Briley v. Taylor, 1 Rus. and My. 73.

CHAP. III. *merely literary*, it will, upon a proper case being made out, allow the injunction; yet where the bill prays that the defendant may be restrained from copying or *imitating* in the whole or any part of the plaintiff's book, the court will narrow the injunction by ordering the words "or imitating," to be struck out.^x

Bonâ fide
abridge-
ment.

It has been held that a person may make a fair and *bonâ fide* abridgment of a work;^y but against a publication only colourably shortened, that being a mere evasion of the statute,^z the court will grant an injunction.

Quotations.

The same principle extends to *quotations*. Although a man may make use of what is denominated a *fair* quotation, yet he cannot under the pretence of so doing publish the whole or part of another's work;^a and it is said by Lord Ellenborough in the case of *Cary v. Kearsley*,^b that a man may make use of another's labours for the promotion of science and the benefit of the public, but, having done so, the question will be, was the matter so taken used fairly with that view, and without the *animus furandi*?

Private
letters.

Private letters having the character of *literary compositions*, upon proper application to the court, will be restrained by an injunction from publication.^c

Musical
compositions.

Musical compositions, being under the statute of Anne considered as writings, for the purpose of claiming protection under a Court of Chancery, are entitled to the same equities as any other species of authorship before mentioned, notwithstanding the published composition be contained within the compass of *a single sheet of paper*

^x Per V. C. K. Bruce, in *Dickens v. Lee*, 8 Jur. 185.

^y *Giles v. Wilcox*, 2 Atk. 143.

^z *Ibid.*

^a *Bohn v. Bogue*, 10 Jur. 420; 7 Law Times, 277.

^b 5 Esp. N. P. c. 170; *Murray . Maxwell*, 3 L. T. N. S. 466.

^c *Pope v. Curll*, 2 Atk. 342.

only, although for some time it appears to have been a CHAP. III.
quæstio vexata.^d

The statutes which at different times have been passed for regulating printed books are the 8 Anne, c. 19; the 41 Geo. III. c. 107; and the 54 Geo. III. c. 156. The period limited for commencing legal proceedings in any case of piracy relating to books is twelve months. Statutes for protecting printed books.

The right which inventors of certain prints and engravings claim in the property of their works depends upon the statutes 8 Geo. II. c. 13; 7 Geo. III. c. 57; and the 17 Geo. III. c. 57. The Acts relating to sculpture are the 38 Geo. III. c. 71, and the 54 Geo. III. c. 56. The 3 & 4 Will. IV. c. 15 affects dramatic productions; the 5 & 6 Will. IV. c. 65 the subject of lectures; while the 6 & 7 Will. IV. c. 110 relieved the author from part of the tax imposed upon publications by the reducing the public-library copies from eleven (the number required by 54 Geo. III. c. 156) to five: in all these cases proceedings must be commenced within six months. By the 8 Geo. II. c. 13, the property of certain prints therein mentioned is vested in the inventors, etc., for fourteen years from the day of publishing, each of which prints shall be truly engraved with the *name* of the proprietor; and persons printing the same without the consent of the proprietor are to forfeit the plate, the sheets on which the prints are copied, and five shillings for every print, etc. Prints and engravings.

The reader is now referred to the 5 & 6 Vict. c. 45, extending the privileges of authors to their copyright of books, musical compositions, and dramatic pieces; it extends the period also for commencing the action to twelve calendar months next after the offence committed, except as to the "public-library copies;" this statute repeals 5 & 6 Vict. c. 45, relating to musical compositions.

^d Hime v. Dale, 2 Camp. 28 (n); Clemente v. Golding, ib. 25.

CHAP. III. the 8 Anne, c. 19, 41 Geo. III. c. 107, and 54 Geo. III. c. 156.

But it has been recently held that where the proprietor of a theatre had dramatized the incidents of a novel written by the plaintiff, and had the play publicly performed, it was not an infringement of the copyright either under the statute 5 & 6 Vict. c. 45, or at common law.^e

5 & 6 Vict.
c. 100, as to
copyright of
designs.

The 5 & 6 Vict. c. 100, repealing the 27 Geo. III. c. 38, 29 Geo. III. c. 19, 34 Geo. III. c. 23, 2 Vict. c. 13, and 2 Vict. c. 17, consolidates and amends the laws relating to the copyright of designs for ornamenting articles of manufacture therein particularly set forth and described.

The 6 & 7 Vict. c. 65, amending the 5 & 6 Vict. c. 100, extends the protection of the last-mentioned Act to such designs as are not of an ornamental character, and not included therein.

These three Acts provide for the due registering of the proprietorship in the copyright of books and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, also the copyright of designs. See also 7 Vict. sec. 4, c. 12, "An Act to amend the law relating to international copyright" (10th May, 1844); the 13 & 14 Vict. c. 104, s. 2, as to the copyright and registration of designs; and the 15 & 16 Vict. c. 12, as to "The International Copyright Act," and to explain the Acts relating to Copyright in Engravings.

Recent decision as to the respective rights of British and foreign authors to protection in their publications.

In a recent case^f (which was an action for infringing plaintiff's copyright in a musical overture to an opera, called 'Fra Diavolo'), it was held—first, that a British subject, by the common law, may freely print and publish in Great Britain any number of copies of a French work, without being exposed to an action at the suit of the

^e Reade v. Conquest, 3 Law Times, N. S., 888.

^f Chappell v. Purday, 14 Mees. and Will. 317-21.

French author, whose exclusive privilege, founded upon the French law, is limited by the French territory; secondly, That, although by the common law, a foreign author residing in another country can have no English copyright in a work published abroad before it is published in England: yet such foreign author, not having published abroad, first issuing his publication in this country, will be entitled to the benefit of the statutes relating to copyrights; but, by the provisions of the last-mentioned statute, the Queen may, by order in Council, direct that the works of authors first published abroad shall be entitled to a copyright therein in this country.

In order that a party may entitle himself to the penalty inflicted by the provisions of this statute, it must be shown that the date and the name of the engraver is engraven on the print; but it has been the subject of considerable doubt whether, in default of these requisites, a party injured by the violation of his rights given by the statute, would be remediless at law or in a court of equity. In a case decided *in Banc.*,^g Lord Kenyon considered that the *date* was of importance, that the public might know the period of the monopoly; and that the *name* should appear, that those who wished to copy it might know to whom to make application for consent.

Rules to be
observed in
seeking
redress.

It is said that formerly the courts were very reluctant to interfere by injunction to restrain the violation of a copyright: thus, in an anonymous case, reported in *Vernon*,^h upon a motion by the king's patentees, for an injunction to stop the sale of English Bibles printed beyond sea, Lord Keeper King refused the application, until the validity of the patent had been tried at law. The same judge

Reluctance
anciently
observed by
the court in
protecting
copyrights.

^g *Thompson v. Symonds*, 5 T. R. 41; but see *Blackwell v. Harper*, 2 Atk. 95; *Roworth v. Wilks*, 1 Camp. 697; *Harrison v. Hogg*, 2 Ves. jun. 323.

^h Vol. i. 120.

CHAP. III. also, in a subsequent case,ⁱ refused to grant an injunction against printing Bibles, until the plaintiffs had brought their action in the King's Bench.

Notions of
a more
modern age.

Under the more modern practice, however, a different usage has been adopted: for, in cases where the circumstances warrant it, the party will be entitled to an injunction, not only to the hearing; but, upon proper application, a perpetual injunction will issue. For, in the case of the Universities of Oxford and Cambridge *v.* Richardson,^j Lord Eldon states that there were many instances in his own memory in which the court had granted or continued an injunction, although the title was not clear at law; that the court had lately said possession under colour of title is ground enough to enjoin.

Negotiable
securities;

5. When *negotiable securities*, such as notes or bills of exchange, have been given for an illegal consideration, or are in any manner tainted with fraud, and are indorsed according to the usage of merchants, the indorsee will not *primâ facie* be affected with the fraud, if the indorsement take place *before they become due*: therefore, the court will interfere to restrain their further negotiation; and, viewing the case in the nature of a bill filed to restrain irreparable mischief, will grant a special injunction, on certificate of the bill filed, supported by an affidavit of the circumstances of the fraud.^k But where the notes or bills are assigned after they have become due, the assignee must take them subject to all the equities which attached to them immediately previous to the assignment. And it is said that, where a bond or covenant, obtained under circumstances of fraud, is assigned to a third person for a

Rules of the
court
respecting
them.

ⁱ Hills and An. *v.* University of Oxford, 1 Vern. 275; see also Baskett *v.* Cunningham, 2 Eden, 137; Grierson *v.* Jackson, Irish T. R. 304.

^j 6 Ves. 707.

^k 1 Fonbl. Eq. 43; Patrick *v.* Harrison, 3 Bro. C. C. 476.

valuable consideration, and without notice, such *bonâ fide* assignee can have no remedy upon the bond, either at law or in equity; for although the more modern usage disregards the policy of our common-law doctrine, which would not permit the assignment of a *chose in action*, yet, in compliance with the ancient principle, whenever, at the present day, a chose in action is assigned (of which the transfer of a bond is an instance), it is considered in the nature of a trust, to permit the assignee to use the name of the assignor to recover payment:¹ consequently, as in this case the holder cannot sue except in the name of the fraudulent assignor, he cannot recover at law upon the bond; he is therefore left to his remedy in equity, which also fails him—the instrument having been obtained by fraud.^m

An assignee of a chose in action, being entitled to all the remedies of the vendor, takes it also subject to the same equity as it was liable to in the assignor's hand; except where bills of exchange or promissory notes are assigned before they become due. These instruments may, in such cases, be enforced by an assignee for valuable consideration, though no consideration may have been given by the party who made the assignment to him. This rule has been adopted for the benefit of trade.ⁿ

The court will grant an injunction immediately upon bill filed, and an affidavit of facts, to restrain a husband from assigning his wife's property, in order to defeat her equity to a settlement out of such property.^o A court of equity will also interpose, by an injunction, to restrain the transfer of stock or the receipt of bank annuities.*

¹ Bl. b. ii. 442.

^m 1 Madd.

ⁿ Madd. Ch. 688.

^o 1 Fonbl. 44 (n).

* See the 4th sect., 5 Vict. c. 5, relating to the restraining of stock, where, upon a summary application, an injunction is granted under the statute; but the party obtaining it must proceed to file

CHAP. III.

Nuisances;
public and
private.

6. Nuisances are either *public* or *private*.

A public nuisance is that which affects many persons, or the community at large. A private nuisance is that which affects individuals, by erecting anything offensive, such as a swine-sty, stopping up or obscuring ancient lights, fixing a spout so near another's dwelling that the rain falls down and injures the foundation thereof, etc.

Public
nuisance.

In the case of a *public nuisance*, the most usual and proper course is to file an information in the name of the attorney-general, whose consent must be obtained for that purpose;^p but it appears that an information is not in all cases of public nuisance absolutely necessary; for, if there be a special grievance arising out of a common injury, which affects certain individuals more than others, equity would, by analogy to the *qui tam* action at law, interfere to protect the private rights of those individuals; and there have been several instances of application, at the suit of private persons, to a court of equity, on the ground of public nuisance.^q

Although a public nuisance be such as to affect many persons, yet it may, at the same time, be of a private nature, where an individual suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance,—as if, by means of a ditch dug across a public way (which is a common nuisance), a man or his horse suffer any injury by falling therein; for this particular damage, which is not common to others, the party shall have his action.^r

In *Spenser v. The London and Birmingham Railway* his bill within due time afterwards. *Marquis of Hertford v. Suisse*, 8 Jur. 71.

^p *Attorney-General v. Heath*, 18 Ves. 214, *arguo*.

^q *Barnes v. Baker*, Amb. 158; *Mayor of London v. Bolt*, 5 Ves. 129; *Duke of Grafton v. Hilliard*, cit. 18 Ves. 219.

^r Bl. b. iii. 320.

Company,^s it was determined that where certain individuals suffer an injury from a public nuisance, quite distinct from that of the public at large, such individuals have a special right distinct also from that of the public at large; and the court will entertain a bill filed by them to be relieved from the nuisance.

Injunctions to restrain nuisances extend to such only as are nuisances at law: the fears of mankind, however reasonable, will not create a nuisance;^t but there are many acts indictable at common law as public nuisances, which cannot, from their nature, be cognizable in a court of equity. A brew-house, dye-house, smelting-house, lime-kiln, tan-pit, or pig-sty, if established in such inconvenient parts of a town as to incommode the neighbourhood, are common nuisances; and everything which causes not only an unwholesome smell, but renders life and property uncomfortable, is a nuisance,^u and may by possibility form a subject for the interference of a court of equity.

The jurisdiction of a court of equity, in cases of purpresture* and nuisance, is founded on the right to restrain the exercise or the erection of that which would create irreparable damage to individuals, or to the public;^v so that, when a nuisance and purpresture in a harbour are committed, an information in equity lies to abate them.^w

^s 8 Sim. 193.

^t Barnes v. Baker; vide Haines v. Taylor, 11 Jur. 73.

^u Rex v. Pappineau, Stra. 686; Rex v. White, Burr. 333; Rex v. Neil, 2 Car. & P. 485.

* Or *pourpresture*, from the French *pourprise*; that is, when one encroacheth, or makes that several to himself which ought to be common to many (Coke, Inst. 2, 38); but which, in its common acceptation, signifies an encroachment on the king, either upon his demesne lands, or in the highways, rivers, harbours, or streets.

^v 3 Atk. 751; Mitf. 155, 4th edit.

^w Attorney-General v. Richards, 2 Anst. 603. See also Attorney-General v. Forbes, 2 M. and C. 133.

CHAP. III.

Private
nuisance.

In cases of *private nuisance*—whether it relates to obscuring ancient lights, or lights not ancient, but the enjoyment of which depends upon some covenant, diverting watercourses, and exposing the plaintiff to inundation, or any other material injury to the comfort of his existence—the court will, upon application, interfere by injunction to restrain a party from proceeding in the grievance which forms the subject of complaint.

Although there have been instances in which the court has granted an injunction to restrain the injury,^x and where a plain case of *nuisance* existed, Lord Hardwicke said the court will interfere upon affidavit, certificate, and notice, and will not suffer the nuisance to go on in the meantime;^y yet now, in almost every case, it seems to be necessary, both in *public* and *private nuisances*, that a judgment at law, ascertaining the rights of the parties, should be obtained previous to *granting* the injunction.^z

Bonds for
purchasing
an office, or
for resigning
a living, void.

Perpetual injunctions may be obtained for several purposes: *e.g.* against a bond given for the purchase of an office, and against a bond of resignation, the patron making an ill use of it, and against proving a will in a spiritual court, which, upon an issue at law, has been proved to be no will.^a

Bill of peace.

Something similar to writs of injunction are bills of peace and bills of interpleader. A *bill of peace* is that which lies in cases where a person has a right which may be the subject of litigation between various persons, at different times, and by different actions; the court will thereupon, for the purpose of preventing a multiplicity of suits,^b direct the parties to try the validity of the title

^x Eliz. Bond's case, Mo. 238.

^y 2 Ves. 453; 2 Dick. 488.

^z Attorney-General v. Cleaver, 18 Ves. 211.

^a 1 Madd. Ch. 230.

^b Baker v. Shelbury, 1 Ch. Ca. 70; 2 Atk. 484.

at law, and if the issue be favourable to the plaintiff, an injunction will be granted. Bills of this description have for their object a perpetual injunction, and are chiefly brought where there are disputes between lords of manors and their tenants, or the tenants of one manor and another, to prevent the endless actions of trespass which might otherwise be brought; since each action would only determine the particular right which formed the subject of it between the parties to the action.^c

A *bill of interpleader* is resorted to, where a person in possession of an object in which he claims no interest or title is in danger of being harassed by the conflicting demands of several other persons asserting their right to the same object, in different or separate interests, and knows not to whom of the rival claimants he ought to deliver it up. The bill prays that such claimants may *interplead*,—that is, try their several rights among themselves, in order that the court may adjudge to whom the property belongs, and that the plaintiff may forthwith stand indemnified. The plaintiff must offer to bring the money or property into court. If the defendants have already commenced actions at law, or suits in equity, the injunction must be prayed for to restrain them from proceeding therein, until the right is determined.^d An affidavit may be read in support of the motion for an injunction.^e As soon as the bill is on the file, the plaintiff may, without waiting for the appearance of defendant, or even before service of subpoena, move *ex parte* for an injunction to restrain proceedings at law. The injunction on an interpleading bill, when obtained, does not, like the

Inter-pleader.

^c Lord Tenham *v.* Herbert, 2 Atk. 483; Harrison *v.* Gardiner, 7 Ves. 310.

^d Langston *v.* Boylston, 2 Ves. jun. 101.

^e Dungey *v.* Angove, 3 Bro. C. C. 36.

CHAP. III. — injunction to restrain an action at law, leave the plaintiff-at-law at liberty to demand a plea and proceed to judgment, but it stays all proceedings.^f Upon filing the bill, the plaintiff ought to annex an affidavit thereto, that he doth not exhibit his bill by *fraud* or *collusion* with the defendants, but *spontaneously* for his own security. If the plaintiff should neglect this formality, and the bill be in consequence demurred to, the court, which does not look upon interpleaders favourably, will not relieve the plaintiff who makes such default.^g

Bill of
Quia timet.

Upon the same grounds of equitable interference, which induce the court, under a *bill of peace*, to relieve persons from being subjected to a multiplicity of suits for the same object,—or by means of a bill of interpleader, to compel several claimants of the same property to ascertain the party really entitled thereto, for the sake of indemnifying an uninterested stakeholder,—it will also lend its aid to a person who is apprehensive of being subjected to a future inconvenience or hardship, which may possibly have resulted from the negligence or inadvertency of another, and will quiet the party's apprehension by removing the cause of it. Thus, where property is bequeathed to one, subject to the life of another person still in existence, and he in remainder is desirous of securing it for himself, against any accident which may befall it previous to the time when it shall fall into possession or his legal remedy can be enforced, he may apply for that purpose, and the court will direct the tenant for life in possession to guarantee the property, by entering into a proper security, against any subsequent disposition or wilful destruction of it. A bill exhibited under these circumstances is called a *bill quia timet*.

^f Warrington v. Wheatstone, Jac. 205.

^g Metcalf v. Harvey, 1 Ves. 249.

Upon the general maxim, "Nemo bis vexari debet pro eâdem causâ," if a plaintiff proceeded both at law and in equity for the same thing, the court until lately would compel him to elect in which court he intended to proceed, the order providing that the plaintiff, his clerk in court (now his solicitor), and attorney at law, having notice of the order, should, within eight days after such notice, make his election in which court he intended to proceed.^h But before the defendant was allowed to put the plaintiff to his election, he must not only have filed his answer, but the time also for the plaintiff's excepting to the answer must have expired, for it might have happened that, until he had a complete answer, the plaintiff could not decide in which court it was most advisable he should prosecute his claim.ⁱ There is, however, an exception in the case of a mortgagee, who it seems may foreclose in equity, proceed to an ejectment at law, and bring an action on the covenant of the mortgagor to pay the money at the same time.^j

The time however for plaintiff to elect was first materially altered by the rules in chancery (9th May, 1839), and now by Ord. XVI. (8th May, 1845), Art. 20 & 21; 42 Cons. Or. r. 6. A defendant whose answer is not excepted to, or referred back on former exceptions, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, upon the expiration of eight days after his answer or further answer is filed, obtain as of course, on motion or petition, the usual order for the plaintiff to make his election in which court he will proceed (Ord. VII. 2nd Nov. 1850; 42 Cons. Or. r. 5). And the defendant whose answer is excepted to, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, by notice in

CHAP. III.

Election
between a
court of law
and equity.Time within
which a
party is
bound to
elect.

^h Jones v. Earl of Strafford, 3 P. Wms. 90.

ⁱ Brown v. Poyntz, 3 Madd. 25.

^j Lyster v. Dolland, 1 Ves. 431.

CHAP. III. writing, require the plaintiff to set down the exceptions, within four days from the service of the notice. And if the plaintiff does not set down such exceptions within such four days, or if they are not allowed, the defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which court he will proceed (Ord. XIII. 2nd Nov. 1850; Ord. LI. 3rd May, 1845; 42 Cons. Ord. r. 6).

A defendant from whom an answer is not required, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may upon the expiration of the time within which he might have been served with interrogatories for his examination in answer to such bill, obtain as of course, upon motion or petition, the usual order for the plaintiff to make his election in which court he will proceed (42 Cons. Ord. r. 7).

The plaintiff however may move to discharge the orders obtained as above, upon the merits confessed in the answer, or, if necessary, appearing by affidavit (8th May, 1845; Ord. LI.; 42 Cons. Ord. r. 8).

Certiorari
and *discovery*
bills.

Of bills denominated *certiorari*, and bills of *discovery*, also bills to perpetuate the testimony of witnesses, we shall hereafter speak more fully. It is therefore only necessary to mention them in this place, as being sometimes made use of for the *prevention of fraud*.

Cases in
which the
court inter-
feres to *re-*
dress fraud.

II. Having in the foregoing division endeavoured to show in what manner the jurisdiction of the court of chancery exercises itself to *prevent* fraud, we shall now proceed to examine the second part of our subject, and see how the court will interfere to *redress* fraud after it has been committed.

Definition of
Fraud.

Fraud, or *dolus malus*, is by the Civilians defined to be "omnis calliditas, fallacia, machinatio, ad circumveniendum, fallendum, vel decipiendum alterum adhibita,"^k

^k D. L. 4, t. 3.

which definition would perhaps be found to embrace the opinion our judges have formed respecting it; although, to give the courts of law and equity a fuller scope for relieving in every instance of deception and artifice that may be employed in all transactions made cognizable before their respective tribunals, they have refrained from stating as a general proposition what really does constitute fraud,¹ or to what extent they will relieve against it.

The master of the rolls, in a recent case,^m referring to the insidious manœuvrings of fraud, says, "Nobody has ever been able to define what fraud is, because it is so multifarious, so accommodative, that it adapts itself to various circumstances."

Fraud, in its highest degree of turpitude, may be considered as being little less than positive crime. And in ordinary cases of fraud it is the province of equity to undo the whole transaction and replace the parties in their former situation.ⁿ But our courts of equity do not regard it in any other light than a civil injury, and will, certainly, in cases where artifice or collusion has been practised, give the injured party a remedy, not only against the fraudulent person, but will extend it also against his representatives.^o Length of time forms no bar to a remedy against fraud: therefore the Statute of Limitations cannot be got up as a defence to a bill for the discovery of fraud.^p Delay will not purge a fraud, for every delay arising from it, adds to its injustice and multiplies the oppression;^q and equity will exercise its jurisdiction and power to relieve in cases of fraud, where the

Fraud, in a moral sense.

¹ *Mortlock v. Bullen*, 10 Ves. 306.

^m *Franks v. Weaver*, 8 Law Times, 511.

ⁿ *Daubury v. Cockburn*, 1 Mer. 644.

^o *Garth v. Cotton*, 3 Atk. 757.

^p *Bicknell v. Gough*, 3 Atk. 558.

^q *Alden v. Gregory*, 2 Eden, 285.

CHAP. III. remedy at law has been barred by the Statute of Limitations,^r although the courts will hesitate to relieve where length of time affords the presumption of acquiescence: for, after discovery, the defendant may avail himself of the stat. 3 & 4 Will. IV. c. 27, s. 26.^s In a bill charging collusion and fraud against the defendant, such fraud must be stated specifically and positively; for the court will not allow parties to go into evidence to prove facts as constituting fraud which are not before alleged in the bill.^t The case referred to in the margin was a second time heard upon demurrer before V. C. Wood, 8th December, 1856, when the demurrer was again allowed.

Fraud in obtaining a will not cognizable in equity.

A court of equity cannot take cognizance of fraud in *obtaining a will*, relating either to real or personal estates. The consideration of the former pertains to a court of law:^u the latter is cognizable only before a spiritual tribunal;^v although the Court of Chancery will interfere for the protection of property, *pendente lite*, for probate and letters of administration.^w In all other cases of fraud, not penal, equity exercises a concurrent jurisdiction with courts of law;^x but, in a recent case, it was held that, notwithstanding this concurrent jurisdiction, there are courses of conduct which the Court of Chancery construes as fraudulent, but which courts of law would not notice;^y and it will not interfere to set aside a will without directing an issue at law,^z nor establish a devise of trust without a trial at the instance of the parties.

^r 11 Jur. 115.

^s Lewin on Trusts, 2nd edit. 917.

^t Bothamley v. Squires, 25 Law Times, 310.

^u Powis v. Andrews, 2 Bro. P. C. 476.

^v Ibid. 449; Archer v. Mosse, 2 Vern. 8.

^w Ryves v. Duke of Wellington, 15 Law Jour. N. S. Ch. 461.

^x Colt v. Woolaston, 2 P. Wms. 136.

^y Clark v. Manning, 7 Beav. 162; 9 Jur. Dig. 230; Middleton v. Sherbourne, 4 You. and Coll. Eq. Ex. 378.

^z Bates v. Greaves, 2 Ves. jun. 378.

The rules which have been laid down upon this subject are the following:^a—1, That the rules of law and equity respecting fraud are the same,—*i. e.* that it must never *be presumed*, although that may be a fraud in equity which is not so at law; 2, If the principal in a fraud be released, those who were only *secondarily* liable cannot be proceeded against; 3, A deed which is impeached for fraud cannot be supported by evidence of considerations wholly different from those stated in it; 4, If a deed be obtained by fraud, it will be set aside *in toto*, and not in part only.^b

CHAP. III.

Rules of law
and equity,
as to frauds,
are the
same.

The *suggestio falsi* is not in every instance relievable in equity; as where, on the part of the vendor, there is a false affirmation of value, or a vague recommendation of the property intended to be sold, denominated by the civil law *simplex commendatio*, because the purchaser is bound to use his senses, and ought not to rely on such wild unmeaning expressions as are used by vendors in praise of their goods. “But even in the chaffering about goods,” said Lord Eldon, in *Sibald v. Hill*,^c “there may be such misrepresentations as would set aside the contract. When the representations were made under such circumstances and in such a way that they took the confidence of the purchaser, and induced him to act when otherwise he would not; this was a fraud which would affect the sale.” And, where there has been a statement given by the vendor, with the intention to deceive in a matter which lies within his own knowledge, and the circumstances are such that the purchaser is not bound to inquire further, as when the vendor asserts that a greater rent is paid for the estate than is actually received, a remedy will lie against him;^d for the value of the rent is only known to the vendor himself, and the purchaser,

*Suggestio
falsi.*

^a 1 Madd. 261.

^b 1 Madd. Ch. Pr. 261.

^c 2 Dow. 266, Dom. Proc.

^d Sug. V. and P.

CHAP. III. after all his diligence, must rely on his (the vendor's) statement of the fact. Equity will also relieve a person who, by false representation, has been induced to enter into a contract, whether the party making the misrepresentation was aware of it or not.^e*

Suppressio veri.

A *suppressio veri*, when it amounts to a fraudulent concealment, is a matter for relief in equity, especially if the party suppressing the truth endeavours to take advantage of the mistake which another has been led into, in consequence of such concealment; and it was said by the lord keeper, in *Salkeld v. Vernon*,^f that no rule was better established than that every deed obtained on *suggestio falsi*, or *suppressio veri*, was an imposition in a court of conscience.

Bath v. Montague.

Lord C. J. Treby, in *Bath v. Montague*,^g mentions a case that had been previously tried in the Court of Chancery, upon the Civil Law doctrine relating to surprise. A man was informed by his kinsman that his son was dead, and so got him to settle his estate upon him. This is known in the Civil Law as *surreptio*, and is thus defined:—"Est cum per falsam rei narrationem aliquod extorquetur." When a man will, by false suggestions, prevail upon another to do that which otherwise he would not have done. His Lordship said he doubted not but that equity would set aside such a transaction, upon the ground of fraud.

Inadequacy of consideration, how far deemed fraudulent.

There has been no little doubt in our courts respecting the subject of inadequacy of consideration—*i. e.* how far unfairness of price will be suffered to affect a contract. When persons stand upon a precisely equal footing with each other, the Court of Chancery takes no account of

^e *Neville v. Wilkinson*, 1 Bro. C. E. 546; *Evans v. Bicknell*, 6 Ves. 174; *Broderick v. Broderick*, 1 P. Wms. 239.

* *Small v. Attwood*; *Attwood v. Small*, appeal.

^f 1 Eden, 69.

^g 3 Ch. Cas. 74.

inadequacy of price, unless from its grossness it is evidence of fraud. In two well-known cases,^h which are usually cited for the sake of the quotation contained in them, we have the opinion of Lord Eldon on the subject; in one of which, after showing that, although a bargain may be unconscionable, yet it may be valid, he adds, "Unless the inadequacy of the price be such as *shocks the conscience*, and amounts in itself to conclusive evidence of fraud in the transaction;" in the other he says, "The inequality must be so gross, as that a man would *start at the bare mention of it*." Now, as all men's consciences are not governed by the same principles—some possessing a greater amount of flexibility than others; insomuch, that where the high-toned sensibility of the moralist would be shocked and scandalized at the bare mention of a hard-fought bargain, that of the keen, sharp-dealing, veteran stock-jobber would lead him to regard it as merely a happy, business-like transaction—it will follow that, to fix the standard of inequality of consideration to that point which is to shock the conscience, would be to establish a medium as variable as human opinion itself, and would answer no other purpose than the endeavour to fix the length of each chancellor's foot as the statute measure of the realm; which would be, according to a high legal authority, an uncertain measure indeed,—for one chancellor has a long foot, another a short foot, and a third an indifferent foot.ⁱ

The ground, then, of setting aside a contract for inadequacy of consideration is *fraud*; and it has been said, that there exists no case where mere inadequacy of price, independently of other circumstances, has been held suffi-

Inadequacy must be fraudulent, to set aside a contract.

^h *Coles v. Trecothick*, 9 Ves. 246; *Astley v. Weldon*, 2 Bos. and Pull. 351.

ⁱ See Selden's *Table Talk*, tit. Eqy., quoted in a note to Bl. Comm. b. iii. 432.

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cient to set aside a contract.^j A bill, therefore, to avoid an agreement for inadequacy or oppression, must be preferred under colour of fraud; which may be proved by the facts attending the transaction, either on the face of the instrument, or by extrinsic evidence. Unless actual imposition is proved by gross inequality, other circumstances of fraud will avail but little; the basis must be gross inequality.^k By the rules of the civil law, a contract for half the value might have been set aside. Also, where a party has, through surprise, been induced to enter into a contract, and seeks to be relieved from it in a court of equity, he must show the surprise to have been such as was accompanied with fraud and circumvention;^l but there may be matters which, upon the suggestion of fraud, the court will take cognizance of, and will even relieve against, yet may not amount to fraud in its sense of moral turpitude, but merely in a technical signification.^m It is a well-established rule in equity, that where one of two innocent parties is called upon to suffer for the fraudulent conduct of a third, it is more equitable that he who puts it into the power of such third person to commit the fraud should suffer than he who is merely passive.

A voluntary settlement, when fraudulent.

A voluntary settlement, although binding against the party who makes it, will frequently be set aside in a court of equity as *fraudulent*: and, by the stat. 27 Eliz. c. 4, settlements which are voluntary are deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even where there has been a previous notice of such voluntary settlement. This statute,

^j Griffith v. Spratby, 2 Bro. 180 n; Lowther v. Lowther, 13 Ves. 103.

^k Sug. V. and P.; Weldon v. Edwards, 2 Ves. 518.

^l 3 Ch. Ca. 114, 115.

^m Vide Glascott v. Lang, 9 Law Times, 3; 11 Jur. 182.

however, does not refer to or affect settlements of personal estate. CHAP. III.

But the settler himself cannot sustain a bill in equity for specific performance of an agreement which is to defeat that settlement; he has no right to disturb it; against him it is valid and binding: when he seeks to get rid of it, the Court will not impede him, but it will not assist him.ⁿ

But where a voluntary conveyance is made by a solvent person in favour of his child, it is good against subsequent *creditors* (provided the deed does not contain a power of revocation, and no retention of possession), though he should become insolvent, but not against *purchasers*.^o Creditors.

If the parent, at the time of such voluntary conveyance, was indebted as far as insolvency, and dies in debt, the child for whom it was intended cannot claim the benefit thereof against the creditors of his father. But a *purchase*, in the name of a wife or child, is not within the Act.^p

From this latter case we may observe, where an insolvent person makes a *post-nuptial* settlement, it is void against existing creditors; because he is, in fact, assuming to give away property which does not belong to himself, but to his creditors: but after-creditors must take the settler's property as they find it: for in trusting him they are not supposed to do so upon the credit of the fund, which has already been divested from him by the settlement, but upon that of which he is already the ostensible owner.^q

ⁿ Wat. Conv. by Morley and Coote, 8th edit. 296 *n*.

^o Russell *v.* Hammond, 1 Atk. 15, 16; 2 Ves. jun. 293; Batterbee *v.* Farrington, 1 Swan. 106.

^p Sug. V. and P. *Vide* Meek *v.* Kettlewell, 1 Har. 473.

^q Taylor *v.* Jones, 2 Atk. 600; Lord Townsend *v.* Wyndham, 2 Ves. 10; *vide* Ede *v.* Knowles, 2 You. and Coll. 178.

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Settlement
before
marriage in
fraud of
creditors,
not relieva-
ble against.

If a man *before* marriage settle all his property, of whatsoever kind it may be, upon his intended wife, though he should be indebted at the time, and she were aware of the circumstance, yet the transaction cannot be impeached, even in favour of creditors; for marriage is in itself a valuable consideration, and is a contract which prevents the parties from being again placed in the same situation as they formerly were. So also, if a settlement be made *subsequent* to the marriage, in pursuance of a bond or other agreement before marriage, or upon an agreement to pay money (if it be afterwards paid), it will be valid, both against creditors and purchasers, provided no fraud be mixed up with the transaction.^r

A voluntary
conveyance
against a
voluntary
conveyance.

Where there is a voluntary conveyance against a voluntary conveyance, the parties will be left to try their right at law; and where one party has no more equity than another, their rival claims will be tested by the well-known maxim, "*Qui prior est in tempore, potior est in jure.*" Thus, in a certain case, the husband, by articles before marriage, agreed to settle the lands upon his wife by way of jointure; after marriage he refused or neglected to make a conveyance pursuant to the articles, but mortgaged the lands to one who had no notice of the articles; the wife was not allowed to have the articles executed against the mortgagee:^s for a creditor has an equal equity with a purchaser.^t This may appear to be, and doubtless is, a gross fraud upon the wife: still the purchaser, who has paid his money, and gained the legal estate in addition, must not suffer. In such an event, the court cannot relieve the lady against the *bonâ fide* purchaser; therefore the sentiment once uttered by Mr. Justice Twysden may be considered as squaring with the broad rule of

^r Brown v. Jones, 1 Atk. 190.

^s 2 Ventr. 343.

^t Vide Francis's Maxims, 14, case 7.

equity: *i. e.* "We must not steal leather to make poor men's shoes."^u CHAP. III.

If a woman (being *sole*) secretly, on the eve of her marriage, convey her property to a stranger, without the knowledge of her intended husband, this will be deemed a fraud, and will not, after marriage, exclude the marital rights from attaching on the property.^v Settlement; when fraudulent against a husband.

If arrears have accrued upon a voluntary bond, they will constitute a valuable consideration, although the bond or instrument itself be void against creditors.^w Arrears upon a voluntary bond.

A gift or voluntary conveyance from a man bordering on extreme old-age, accompanied with a weakness of mind, will be viewed with jealousy by the courts; for if any imposition, undue influence, or stratagem, appears to have been resorted to by persons in whose favour the gift is made to procure it, such conduct will be a ground for setting aside the conveyance.^x But old-age, where there is no proof of fraud, will not invalidate a transaction.^y Neither is *weakness of mind*, provided it does not sink into that state in which a man is said to be *non compos mentis*, a sufficient reason for rendering void a contract, unless fraud should appear in procuring it: "For the Court will not measure the size of people's understandings or capacities; there being no such thing as an equitable incapacity where there is a legal capacity."^z Gifts from extremely aged persons.

But where an illiterate and weak-minded old man, not absolutely sunk into such a state of mental imbecility as to be incapable of managing his own affairs, but in such

^u Earl of Plymouth *v.* Hickman, 2 Vern. 167.

^v Draper's case, 2 Freem. 29; Pett *v.* Hunt, 1 Vern. 18.

^w Gilham *v.* Locke, 9 Ves. 612.

^x Bridgman *v.* Green, Wilmot's Cases, 61; see also Hunter *v.* Atkins, 3 My. and K. 113.

^y 1 Madd. Ch. 376.

^z Osmond *v.* Fitzroy, 3 P. Wms. 131.

CHAP. III. a state of mental incapacity as to render it necessary that he should have protection and advice, executed a deed of conveyance of his property for a grossly inadequate consideration, the court, on a bill filed by the heiress-at-law and her husband, declared that the deed must be set aside as an absolute conveyance, and stand as a security only for money advanced by the purchaser and properly expended by him on the property.^a

Underhand agreements.

Marriage-brokage bonds.

Underhand agreements, such as where a debtor by any additional security does that which would amount to a fraudulent preference; *marriage-brokage* bonds, which are contrary to public policy as tending to introduce improper and improvident marriages.—The court appears very early to have set its face against transactions of this kind; for, in the case of *Arundel v. Trevillian*,^b during the reign of Charles I., the plaintiff had entered into a bond or bill of £100 to the defendant, for effecting a marriage between the plaintiff and Eliza, his then wife, which was brought about accordingly; but the court, disliking the consideration whereupon the bill was given, the same being of dangerous consequences, *upon reading precedents* wherein the court had given relief in like cases, thought it not fit to allow any countenance to speculations entered into upon such contracts, and decreed the bill to be cancelled.

Difference between a staid widow and a young maiden, as to marriage bonds.

The court, however, in a more recent case,^c A.D. 1686, seemed to have made a distinction between a bond given by one party to another to assist the obligor to his marriage with a widow forty-five years of age, and a young

^a *Longmate v. Ledger*, 6 Jur. N. S. 481, V. C. S. See also *Notridge v. Prince*, 2 Giff. 264; 6 Jur. N. S. 1066; 29 Law Jour. Chan. 857.

^b 1 Rep. Ch. 47.

^c *Drury v. Hooke*, 2 Ch. Cas. 176; S. C., 1 Vern. 412, and the note.

maiden that had not friends to advise her ; the court giving relief, and setting aside the instrument in the latter case, although not in the former. And, in detestation of fraud, equity has set aside not only articles, agreements, conveyances, etc., but even fines, recoveries, judgments, and other matters of fraud.^d CHAP. III.

Provisions, also, in a deed or will tending to restrain marriage, are discountenanced by the courts : Lord Thurlow, in *Scott v. Tyler*,^e in his judgment dated 1788, thus adverts to the general principles and decisions upon the subject of clauses in restraint of marriage :—" The cases involved in the innumerable decisions quoted by counsel are so short, and the dicta so general, as to afford me no distinct view of the principle upon which the rule is laid down, or consequently of the extent of the rule or the nature of the exceptions to which its own principle makes it liable. The earlier cases refer in general terms to the Canon Law as the rule by which *all* legacies are to be governed. By that law, undoubtedly, all conditions which fell within the scope of this objection (the restraint of marriage) are reputed void, and, as they speak, *pro non adjectis* ; but these cases go no way towards ascertaining the nature and extent of the objection. Scott v. Tyler.

" Towards the latter end of the last and the beginning of the present century, the matter is more loosely handled. The Canon Law is not referred to (professedly at least) as affording a distinct and positive rule for annulling the obnoxious conditions ; on the contrary, they are located as partaking of the force allowed them by the law of England. But in respect of their imparting a restraint of marriage they are treated at the same time as unfavourable and contrary to the common weal and good order of society.

" To avoid the supposed force of these obnoxious con-

^d *Waller v. Dalt*, 1 Ch. Cas. 276.

^e 2 Dick. 717.

CHAP. III. ditions, strained constructions were made upon doubtful signs of consent, and every mode of artificial reasoning was adopted to relax their rigour. This was thought more practicable by calling them conditions subsequent; though, if that had made such a difference, they were, and indeed must have been, generally, conditions precedent, as being the terms on which the legacy was made to vest; at length it became a common phrase that such conditions were only *in terrorem*. I do not find it was even seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen; but the court disposed of such conditions, so as to make them amount to no more."

Fraudulent alienations by executors also, are all of them transactions which will be relieved against in a court of equity.

In connection with the subject of injunction may be mentioned certain powers of the court, which are known by the names of Restraining Orders, Stop Orders, and Distringas upon Stock; and first of—

Restraining Orders.—The 40 Geo. III. c. 36, enables a court of equity, before or upon hearing any cause depending therein, to order the Governor and Company of the Bank of England to suffer a transfer of stock standing in their books to be made, or to pay any accrued or accruing dividends thereon, belonging to or standing in the names of any party to a suit, as such courts may deem just, or to issue an injunction to restrain them from suffering any transfer of such stock, or from paying any dividends or interest accruing or accrued due thereon, although such governor and company are not parties to the suit in which such decree or order shall be made.

But it was necessary in order to obtain an injunction under this Act, that a suit should have been instituted, and then it must only have been upon a special applica-

tion upon notice to the defendant. Therefore, to obviate the delay and inconvenience arising from this mode of proceeding, it was enacted by 5 Vict. c. 5, s. 4, that it shall be lawful for the Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way, without bill filed, to restrain the governor and company of the Bank of England, or any other public company, whether incorporate or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the said Court of Chancery upon such motion or petition as aforesaid shall specify the amount of the stock, or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing; provided always that the said Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs upon such application, as to the said court shall seem fit.

An application under this Act must be accompanied by an affidavit showing special grounds for the intervention of the court,^f and the order, when once obtained, will continue in force until an application to discharge the same; but the party obtaining the order ought to file his bill within a reasonable time, since it is only granted for interim purposes.^g And in discharging the order the court will be guided, not merely by the statements con-

^f *Ex parte* Field, 1 Y. and C. 1.

^g *Re* Marquis of Hertford, 1 Hare, 584; 8 Jur. 71; 1 Ph. 203.

CHAP. V. — tained in the answer, but also by the affidavits filed both in opposition to, as also in support of the answer.

Stop Orders. *Stop Orders.*—When any person is entitled to any stocks or funds *standing in the name of the accountant-general* of the court, either to the general credit of any particular cause, or to the account of any person, the court will grant a *stop order* for the purpose of restraining the transfer or payment of such stocks or funds, or any part thereof, without notice to the assignee of the person entitled in expectancy or otherwise to any share or portion of such stocks or funds. Before the passing of the 15 & 16 Vict. c. 80, a special application was made to the court upon petition before the order could be obtained. But by the 26th section of the above Act, the master of the rolls and vice-chancellor, while sitting at chambers, may dispose of such matters as each such judge may from time to time see fit.

Applications
for, at cham-
bers.

Applications for stop orders must now be made at chambers, where the assignor and assignee concur,^h otherwise the application will still be by petition; and then both the title of the assignor, and the assignment by him to the assignee, must either satisfactorily appear or be proved by affidavit.ⁱ

Upon the order being granted, it is drawn up, passed, and entered; copies of which are afterwards served on the solicitor of the party in whose name the fund is standing, and at the accountant-general's office, where a minute of it is made in the books.

When the order has been served, the fund to which it relates will not be paid out until the order is discharged, or an order is made directing payment notwithstanding the stop order.

^h Edmonson v. Harrison, Week. Rep. 140.

ⁱ Quarman v. Williams, 5 Beav. 133; Wood v. Vincent, 4 Beav. 419.

By the 1 & 2 Vict. c. 110, s. 14, if any judgment debtor shall have any government stocks, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his own name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. But no proceedings to have the benefit of such charge must be taken until after the expiration of six calendar months from the date of the order. See also 3 & 4 Vict. c. 82.

CHAP. III.

1 & 2 Vict.
c. 110.

Distringas on Stock.—Before the passing of the 5 Vict. c. 5, the Court of Exchequer was divided into two branches, the one called the equity side and the other the plea side of the Exchequer; but by that Act the equity jurisdiction is transferred to the Court of Chancery. Whilst the two branches of the Exchequer Court were united, any party being desirous of restraining the transfer of stock or payment of dividends by the Bank of England, might obtain a *distringas* from the Court of Exchequer against the Bank, and serve it upon the secretary of the Bank, together with a notice not to permit the transfer of the stock or payment of the dividends in such notice specified.

Distringas
on stock.

By section 5 it is enacted that instead of the writ of *distringas* as theretofore issued from the Court of Exchequer, a writ of *distringas*, in the form set out in the first schedule to the Act, should be issued from the Court of Chancery, and be sealed at the Subpœna Office, which

CHAP. III. should have the same force and effect as was then in force in the said Court of Exchequer.

But a party having obtained a *distringas* under this section is not precluded, upon a proper question of merits, from afterwards obtaining a restraining order under the 4th section of the same Act.^j

Any person claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, may, by his solicitor, prepare a writ of *distringas* pursuant to the said Act, in the form set out in the first schedule to the Act, and may present the same for sealing at the Subpœna Office (Ord. I. 17th Nov., 1841; 27th Cons. Ord. r. 1). The writ, when sealed, which was formerly done at the office of the patentee of Subpœna Office, but now at the Office of the Clerk of the Records and Writs, is, together with a notice, taken to the Bank of England and served upon the chief accountant.

The governor and company of the Bank of England having been served with the writ of *distringas*, and a notice not to permit the transfer of the stock in such notice and in the affidavit specified, or not to pay the dividends thereon; and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer or pay such dividends, shall not, by force or in consequence of such *distringas*, be authorized without the order of the court to refuse to permit such transfer to be made, or to withhold payment of such dividends for more than eight days after the date of such request (Ord. IV., Nov. 1841).

^j *Re Marquis of Hertford*, 6 Phil. 129.

If either party be desirous of discharging the writ, it is ordered that such writ of distringas, and all process thereunder, may at any time be discharged by the order of the court, to be obtained, as of course, upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application, by motion on notice or by petition duly served of any other person claiming to be interested in the stock sought to be affected by such writ; and that upon or after such application, such costs thereto and to the said writ as to the court shall seem just, may, if the court shall think fit, be awarded and ordered to be paid by the person or persons who obtained such distringas, or upon any application by any other person or persons (Ord. III., Nov. 1841).

CHAP. III.

CHAPTER IV.

INFANTS.

Court of
Wards.

It is stated by Blackstone that, when the Court of Wards was abolished, by 12 Car. II. c. 24, the guardianship which was annexed to the king, as lord paramount, under the feudal system, over all his infant tenants, became totally extinguished, but resulted to the king in his Court of Chancery, together with the protection of all other infants within his dominions.^a

Care of the
crown over
infants
assigned to
the chan-
cellor.

The guardianship which pertained to the crown being taken away, the *care* only of infants and also of their estates belongs to the sovereign, as *parens patriæ*, which care is delegated by him to the Court of Chancery, and is confined to that court alone: since, neither the Exchequer, nor any other court, can assume the right of appointing a guardian, unless it be a guardian *ad litem*, to conduct the defence of the infant, if a suit be commenced against him; which power is incident to the jurisdiction of every court of justice, as also to take care of the property of the infant, whenever his interests are brought before them judicially.

Doubts as to
the care of
Chancery

Both these above positions have been questioned, and probably with some degree of reason and truth: the one

^a Bl. b. iii. 427. Smith v. Smith, 3 Atk. Rep. 304.

is denied, on the ground that the Court of Wards was established for the purpose of guarding the interests of the lord, and not to abridge or control the legal right of the natural father; the other proposition is also disputed, on the principle that, if the authority over infants resulted to the king as *parens patriæ*, and by him assigned over to the Court of Chancery, then would the court be bound to interfere in the case of the children of the poorest subject in the land; whereas, it never interferes except in questions wherein property is involved, and which require, in the case of a minor, some protection to be thrown around it.

CHAP. IV.
over infants
generally.

“Every one,” says Lord St. Leonard’s, in *Stanton v. Percival*, Dom. Proc. L. T. v. 26, p. 50, “knows the distinction between an infant and a lunatic. The crown took the estate of the infant under its care. In the case of the lunatic, it was otherwise; the crown did not take the estate, but it took the guardianship of the estate, not for the purpose of adverse possession, but merely for its protection and preservation.”

The Court of Chancery will exercise no authority over an infant, unless he be made a ward of court, which is done by merely filing a bill on his behalf.^b But there are instances where the court, upon petition without suit depending, has appointed a guardian and maintenance on behalf of the infant.^c And where the property is very small,* a guardian will be appointed on a petition only, without reference to chambers;^d but where an allowance

Necessary
to be made
wards of
court.

^b Amb. 303.

^c *Ex parte Kent*, 3 Bro. C. C. 87; *Ex parte Salter*, ibid. 500, and see the cases cited; *vide In re Bond*, 11 Jur. 114.

* As a general rule, where an infant has £100 per annum, an allowance for maintenance will not be granted on petition only.—1 Madd. Ch. Pr. 445.

^d *Ex parte Wheeler*, 16 Ves. 266.

CHAP. IV. for maintenance is sought, and the property is large, a bill must be filed;^e and if the infant be resident out of the jurisdiction, the court will appoint a guardian *ad litem* without a commission.^f The court has no jurisdiction to appoint a receiver unless a cause be depending.^g

Power of the court to control a parent's right over his children.

Notwithstanding the power which a father may claim over his children during their minority, as their natural and legal guardian, yet if from his character and general conduct, the court has reasons to consider him an improper person for the custody of his children, it will order their removal from his contaminating influence, for the sake of morality and general policy. The jurisdiction of the court assumes this paramount authority by reason of its representing the king as *parens patriæ*:—thus, Lord Eldon, in the case of *De Mannerville*,^h states that he once removed a child from his father, who was in the constant habit of drunkenness and blasphemy, poisoning the mind of the infant. The court has also ordered the removal of a man's infant children from his custody, and appointed another guardian, where the father appeared to have exercised gross ill-treatment and cruelty towards his infants;ⁱ and in another case where the father had become insolvent, the court exercised the same control. The Court of Queen's Bench will interfere with paternal rights only in cases of very gross misconduct: comparative destitution is not a sufficient ground.^j Cruelty and ill-treatment by a husband against his wife is not reason why he should be deprived of the custody of his infant children. It is only in cases of immorality, and misconduct injuri-

^e *Ex parte* Mountfort, 15 Ves. 448.

^f *Hetherwood v. Hetherwood*.

^g *Ex parte* Whitfield, 2 Atk. 315.

^h 10 Ves. 61; and see *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

ⁱ *Whitfield v. Hales*, 12 Ves. 492.

^j *In re* Pulbrook, 11 Jur. 185.

ous to the children, that the court will interfere;^k and in more recent cases, it has been held that the court has no jurisdiction to remove a child from the custody of its father, on the ground of poverty merely, nor even because it will be for his general welfare that it should be so removed; although gross cruelty, amounting to what the Civilians call *sævitia*, would induce the court to do so. Neither will the peculiar religious opinion of the father operate as a reason for removing a child from his custody.^l

But when a father was about to take his child, being a ward in chancery, into a foreign country for the purpose of educating him there, he was restrained from so doing by the court.^m Indeed, it is the policy of the court of equity to discountenance as much as possible the removing of infant wards out of its jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity; as where it is proved that a constant residence in a warmer climate is absolutely essential to their health: but the court will compel the guardians to bring them within the jurisdiction when required.ⁿ In the case referred to in the margin, the lord chancellor (Cottenham), after adverting to the principle on which the court proceeds, thus expressed himself: "Independently of this well-established rule of the court, and the principle upon which it proceeds, I am convinced that scarcely anything can be more injurious to the future prospects of English children, and particularly to English boys, than a permanent residence abroad. Without the

Taking a child, being a ward of court, into a foreign country.

Lord Cottenham's opinions on this subject.

^k *Re Spence*, Infants, 9 Law Times, 241.

^l *In re Curtis*, 7 W. R. 474, per V. C. K.; S. C., 5 Jur. N. S. 1147; 28 L. J. Ch. 458.

^m 10 Ves. 63; *Eyre v. Countess of Shaftesbury*, 2 P. W. 102.

ⁿ *Campbell v. Mackey*, 2 My. and Cr. 31; *Stephens v. James*, 1 My. and K. 627; *Wyndham v. Ennismore*, 1 Keene, 467.

CHAP. IV. proper opportunities of attending the religious service of the church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming from day to day less adapted to the position which it is to be wished they should hereafter occupy in their native land."

Stat. 2 & 3
Vic. c. 54,
extending a
mother's
right of
access to
her infant
children.

The somewhat harsh and unnatural law which, in cases of separation between the parents, denied the mother all access to her children, if the father chose to withhold them from her, underwent a salutary alteration by means of the stat. 2 & 3 Vict. c. 54. Before the passing of this Act, the father alone had the legal power over his children till the age of twenty-one years; but the mother, as such, was only entitled to their reverence and respect,^o which right, however, according to some moral writers and common experience, is such as provides but an imperfect obligation.^p But under the provisions of the above statute, it is enacted that, after passing of the same, it shall be lawful for the lord chancellor (under which title, according to a recent case,^q is included also the vice-chancellor) and the master of the rolls in England, and for the lord chancellor and the master of the rolls in Ireland, respectively, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant, at such times, and subject to such regulations, as he shall deem convenient and just; and if such

^o Bl. i. 453.

^p Paley, Mor. Phil.

^q *Ex parte* Mrs. —, *in re* the Custody of Infants Act. West. Nov. 8, 1839.

infant shall be within the age of seven years, to make order that such infant shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just. But the privileges of this statute do not extend to any mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband, or by sentence of an ecclesiastical court. And where the mother had contracted extravagant habits, and was without the means of contributing to the children's support, and had married a second time, concealing that fact from the children's guardian, the court refused an order for the delivery of the children to her, although she had not been guilty of any moral delinquency.^r

In any suit for the purpose of obtaining a judicial separation under the 20 & 21 Vict. c. 85, and on any petition for dissolving a marriage, the court may, from time to time, before final decree, make such interim orders and such provisions in the final decree as it may deem just and proper, with respect to the custody, maintenance, and education of the children of the marriage, and direct proper proceedings to be taken for placing them under the protection of the court (sec. 35). Under this section of the Act, the court, in dealing with the custody of children, has a discretionary power, exceeding that possessed by courts of common law, and should, in exercising it, make such orders as are just and proper, with reference to the circumstances affecting the suit, taking into consideration the interests of both the children and parents,^s and will adhere to or depart from the common-law rule, according to its discretion.^t But the Act does not inter-

^r *Shillito v. Collett*, 8 Week. Rep. 683 ; on appeal, 696.

^s *Marsh v. Marsh*, 28 L. J. Matr. Cas. 13.

^t *Spratt v. Spratt*, 1 Sw. and Tris. 215.

CHAP. IV. fere with the legal right of the father to have the custody of his children, where no petition has been presented.^u

The jurisdiction of the Court of Chancery with respect to infant wards generally relates to—1, guardianship; 2, maintenance; 3, marriage.

12 Car. II.
c. 24, as to
guardian-
ship.

1. The stat. 12 Car. II. c. 24, gives the father power to dispose of, by testamentary disposition, the guardianship of his children, which may extend, if males, to the age of twenty-one years; if females, to that period or marriage, whichever may first happen: and, under this statute, it has been determined that a father may dispose of the guardianship of such of his children as may *hereafter* be born, including those he may have by a subsequent marriage.^v

A father, strictly speaking, cannot appoint a guardian to his *natural* child; but where he nominates persons to be guardians by his will, who consent to undertake the charge, the court will appoint them to be guardians without any reference to the master.^w

A mother cannot appoint a testamentary guardian,^x although she may be appointed a guardian; neither is the office of testamentary guardianship assignable, it being a bare power or trust, and therefore will not pass to executors or administrators.^y

A stranger
may, under
some cir-
cumstances,
appoint a
guardian.

Ordinarily a guardian cannot be appointed for a child by a stranger, however much the child may be benefited by him, so as to deprive the parent of the right which naturally belongs to him of being its guardian; but where

^u *Ex parte* Young, 4 Week. Rep. 127.

^v 7 Ves. 348.

^w *Chatteris v. Young*, 1 Jac. and W. 106; *Ward v. St. Paul*, 2 Bro. C. C. 583; *Peckham v. Peckham*, 2 Cox, 46; 1 Madd. Ch. Pr. 435.

^x *Vellareal v. Mellish*, 2 Swan. 536.

^y *Mellish v. De Costa*, 2 Atk. 14; 1 Madd. Ch. 436.

a stranger leaves a legacy to an infant child, the law will see that he is educated according to his expectations.^z Neither can a grandfather appoint guardians to his grandson; but he may give his estate to him on that condition, and the father submitting is bound by it.^a And when the considerations are solid, and not merely expectations, as where there has been some immediate irrevocable provision by which the child could be brought up in a manner suitable to its future property, the court will not suffer the father wantonly and capriciously to disappoint the expectations of his child; but the circumstance that a father's consent may be purchased by pecuniary considerations does not break in upon the strictness of the above rule; it merely shows that this paternal right, like any other, may be the subject of contract for a valuable consideration: thus, in the case of *Lyons v. Blenkin*, where a testatrix gave a moiety of an estate to her three infant granddaughters as tenants in common in fee, and appointed her own daughter as the guardian of their fortunes, with a discretionary trust for their maintenance; their father being still living, the court refused an application of the father that his children might be delivered up to him, Lord Eldon saying that, under the circumstances, the testatrix, by the benefits she gave the children out of her property, had purchased the power of educating them in the way and under the control and guardianship which she had pointed out and the parent had *consented* to; his view of the case being that if a testator think fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period make a further provision for them, and the father permit their maintenance to be supplied from that source, allowing them to be brought up with expectations founded

^z *Powell v. Cleaver*, 2 Bro. C. C. 500.

^a *Blake v. Leigh*, Amb. 306.

CHAP. IV. upon a particular species of maintenance and education which he himself cannot afford to give them, he is not, according to the principles of the court, at liberty to say that he will take them from the course of education which they have hitherto pursued, and that too at a period approaching to maturity of age, by applying a more scanty means for the purpose. His Lordship however thus refers to the original principle:—"Nobody can doubt that if I give a provision to your child, it does not give me or any one else a right to control your care of her. Not at all: but on the other hand, if when she is young I were to give her a considerable maintenance during her infancy, which you could not have supplied, and a large fortune afterwards, and you, the father, *permit* her to take the advantage of that education, which you could not have afforded but through my gift, could you afterwards stop short, and say that she should no longer have that advantage? Under such circumstances the court would inquire what was most for her benefit."^b

Guardian
substituted.

Where a testamentary guardian refuses to act, another guardian may be appointed by presenting a petition, and it is not necessary to file a bill; but it is otherwise if he has accepted the guardianship or acted therein, and has misconducted himself, for then a bill, and not a petition, must be filed,^c unless there be a cause already before the court.

When any dispute arises between guardians as to the management of their ward, the court will interpose and assume the office as guardian-in-chief. And where there are differences as to the education of the ward, parol evidence may be admitted, showing the intention of the deceased father.^d

^b Jac. Rep. 245.

^c O'Keffe v. Casey, 1 Sch. and Lef. 106.

^d 1 Madd. Ch. 444.

2. With regard to *maintenance*, it was formerly con- sidered that the father, being bound by nature to support his child, could not claim any allowance out of the infant's property for his maintenance, unless totally incapable, either from poverty or having a numerous family to provide for besides, and was thereby reduced to indigent circumstances; but now it is not necessary to show that the guardian or father is in distressed circumstances,^e for if they be not of *ability* to maintain the ward *according to his expectations*, they may claim a suitable allowance to be made for him during his minority.^f

CHAP. IV.
Maintenance
of infants.

An allowance for maintenance to a guardian must be in relation to that which the infant is then entitled to, and not in regard to what falls in afterwards.^g

The court will allow maintenance where the principal and the interest of a legacy to a child is vested, although there be a direction that the interest shall accumulate till a legatee attain his age of twenty-one years.^h And where, under an accumulation clause, the children have as among themselves an equal chance to take the capital with the accumulation, the court assumes the right of controverting the direction of the will if it see that it is for the benefit of the infants, the chance of surviving being equal, and can procure the consent of all persons interested. But when, in the event of the death of a child under the age of twenty-one leaving issue, the accumulated property would have gone to the issue, Lord Eldon expressed it as his decided opinion that maintenance could not be allowed to that child.ⁱ

Generally, trustees were not formerly allowed of their

^e Roach v. Garvan, 1 Ves. 160.

^f Buckworth v. Buckworth, 1 Cox, 80.

^g Chaplin v. Chaplin, 3 P. Wms. 368.

^h Stretch v. Watkins, 1 Madd. 253.

ⁱ Errat v. Barlow, 14 Ves. 203.

CHAP. IV. own authority to break in upon the capital of an infant's fortune for maintenance. It very rarely has occurred that the court itself has done so, except for the purpose of putting the child out in life.^j

But now, by the Trustees and Mortgagees Act, 23 & 24 Vict. c. 145, s. 26, trustees are empowered to apply the whole or any part of the income or accumulations of income of any property held in trust for an infant either absolutely or contingently on his attaining twenty-one, or on the occurrence of any event previously to his attaining that age, towards the maintenance or education of such infant, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not. These powers may however be negatived by express declaration (sec. 32).

Wherever maintenance is allowed, it is always to be paid to the father out of the child's estate, and was never known to be deducted out of a legacy left by the father to his child.^k

Marriage of
infants.

3. *Marriages of infants.* The marriage of an infant ward, without the consent of the guardians, is called a *ravishment of the ward*, and is punishable by stat. West. 2, c. 35.

When an infant is a ward in Chancery, the consent of the court must be obtained upon a treaty of marriage, and the court will generally order a reference to chambers, to ascertain whether the settlement proposed be a fit one; and if the court be not satisfied therewith, it will not allow the marriage to take place: for although equality of portion and fortune between the ward and the person seeking her in marriage be not the material ingredient in the happiness of married life, yet the court in this re-

^j Walker v. Wetherell, 6 Ves. 474.

^k Jeffreys v. Jeffreys, 3 Atk. 123; 1 Madd. Ch. 447.

spect acts by way of analogy to the anxiety and prudence of the natural parent, who always takes care that such provision shall be made as will enable infants to live in the world suitable to that rank to which their birth entitles them.¹ Where terms for the settlement of property of an infant female ward have been approved of by the master, it is not competent to the husband and wife, by delaying the marriage till after the wife has attained her majority and entered into fresh settlements, to defeat the settlement of the court.^m

If a female ward in Chancery be desirous of marrying, the court will look very anxiously into the circumstances and fortune of the intended husband: if he be of similar rank and fortune to the ward, attention will be paid to such circumstances; but if he prove to be a mere fortune-hunter, having no property of his own, the court will not allow him to touch any of her wealth;ⁿ although it is the usual custom of the court, for the purpose of securing the happiness of the lady, and ensuring the good conduct of the husband, to empower her, under the marriage settlement, to give one-fifth of her property to her husband, by will. But when a ward of the court, having married without consent, *died*, pending a reference to the master for a settlement of her property, leaving one child, the husband, who was guilty of contempt in marrying her, having petitioned for part of her fortune, his application was dismissed with costs.^o

Caution observed by the court as to the marriage of a ward in Chancery.

Marrying an infant ward of the court, without consent, is a high contempt; and all persons concerned in the contrivance of it, knowing it to be such, are punishable for the contempt:^p and, on the petition of the guardian, all

Contempt in marrying a ward of court.

¹ Smith v. Smith, 3 Atk. 305.

^m 2 Coll. C. C. 412; 10 Jur. Dig. 98.

ⁿ Ball v. Coutts, 1 Ves. and Beav. 297.

^o Dean v. Long, Rolls, Nov. 24, 1836.

^p Moore v. Moore, 2 Atk. 157.

CHAP. IV. the parties will be ordered to attend, and the husband will be committed, and forbidden to receive the visits of his wife, until the execution of a settlement approved of by the master, when the husband may present his petition to be discharged. And it seems that marrying an infant ward of the court is a contempt, although neither the husband nor any of the parties concerned had any notice that the infant was a ward of court; but such contempt will be considered as criminal or merely technical, according to the conduct of the parties concerned and the circumstances of the case.^q If there exist any ground of suspicion of a ward in court being about to make an improper marriage, and there is an affidavit of such intended marriage, the chancellor will grant an injunction generally, to restrain all communication with the infant, by letter or otherwise.^r Where an infant defendant had married without obtaining the consent of the court, certain funds in court, standing in her name, were ordered to be paid to her husband with her consent, no settlement having been made.^s

Male and
female wards
in Chancery.

A lady being entitled to property upon attaining twenty-one, or marriage, married under age: it was held that even this contingent interest in property was sufficient to entitle her to be made a ward of court, and that her mother might present a petition for a settlement.^t But the court has no jurisdiction to compel a male ward, with whom a marriage has been solemnized without its consent, on attaining his full age, to execute a settlement of his estate, so as to exclude his wife from all participation in the property.^u By the 18 Vict. c. 43, infants may,

^q *Martin v. Forster*, 25 Law Times, 5.

^r 1 Madd. Ch. 453.

^s *Bennett v. Biddles*, 10 Jur. 334.

^t *Russell v. Nicholls*, 16 L. Journ. N. S. Ch. 47.

^u *In re Murray*, 3 Dru. and W. 83.

with the sanction of the Court of Chancery, make valid and binding settlements or contracts for a settlement of their real or personal estate in contemplation of marriage, which shall be as valid and effectual as if the person executing were of full age. But the Act does not apply to male infants under twenty or females under seventeen years of age. CHAP. IV.

As infants are favourites of the Court of Chancery, they cannot be bound by any settlement but what is fair and reasonable.^v

Before the passing of the 7th Anne, c. 19, if a mortgagee died in possession, and the estate descended to his infant heir, the mortgagor could not redeem his estate until such infant attained his age of twenty-one years; but by this statute infant *trustees* or *mortgagees* are empowered to convey, under the direction of Chancery, the estates they hold in trust or mortgage, to such persons or person as the court shall direct.^w 7 Anne, c. 19,
as to infant
trustees or
mortgagees.

This statute, however, did not relate to cases in which the infant was a mere *trustee by construction*;^x as where the mortgage-money had been paid off previous to the death of the mortgagee, without any reconveyance of the mortgaged estate having been executed; or where a person having contracted for the sale of his estate (which in equity constitutes him a trustee of the estate for the purchaser) dies before a conveyance has been effected: but now, under the statute 1 Will. IV. c. 60, the Court of Chancery is in the former instance empowered to make the infant heir of the mortgagee convey the estate to the mortgagor, and in the latter to compel the infant heir of the vendor to convey the estate to the purchaser. When an
infant is
constructive
trustee.

Also, a more extensive power is given to the court to 2 & 3 Vict.
c. 60.

^v Williams v. Williams, 1 Bro. C. C.

^w 1 Madd. 357.

^x Sug. V. and P.

CHAP. IV. enforce conveyances by infants, under the 2 & 3 Vict. c. 60, intituled "An Act to explain and extend the provisions of an Act passed in the first year of his late Majesty, King William IV., intituled 'An Act for consolidating and amending the laws for facilitating the payment of debts out of real estates:'" wherein, after reciting that by the said Act it was (among other things) enacted, that where any lands, tenements, and hereditaments had been or should be devised in settlement, by any person whose estate, under the said Act then in recital, or by law, or by his will, should be liable to the payment of any of his debts, and by such devise should be vested in any person for life, or other limited interest, with any remainder, limitation, or gift over, which might not be vested or might be vested in some person from whom a conveyance or other assurance of the same could not be obtained, or by way of executory devise, and a decree should be made for the sale thereof, for the payment of such debts, or any of them; it should be lawful for the court, by whom such decree should be made, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest so to be sold, to the purchaser or purchasers, or in such manner as the said court should think proper; and every such conveyance, etc., or other assurance, should be as effectual as if the person who should make and execute the same were seised or possessed of the fee simple, or other whole estate to be sold; and further reciting that doubts were entertained whether the thereinbefore recited provisions of the said Act extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or trustees (as therein were mentioned), or of lands, tenements, or hereditaments, so devised in settle-

ment as aforesaid, and also to authorize such sales and mortgages to be made, in cases where such tenant for life, or other person having a limited interest, or such first executory devisee, as aforesaid, was an infant: it was therefore enacted that the said thereinbefore recited provisions of the said Act should extend to authorize courts of equity to direct mortgages, as well as sales, to be made of the estates of such infant heirs or devisees, and also of lands, tenements, or hereditaments, so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made, in cases where such tenant for life, or other person having a limited interest, or such first executory devisee, is an infant.*

* The Trustee Extension Act, 15 & 16 Vict. c. 55, s. 3, provides that in the case of an infant solely entitled to any stock or jointly with any other person, the court may make an order vesting the right to transfer the same, or to receive the dividends or interest thereof, either in the person jointly entitled with the infant, or in him or them together with any other person or persons the court may appoint. The statute 11 Geo. IV. and 1 Will. IV. c. 65, gives the Court of Chancery and the lord chancellor powers over estates in which lunatics and other persons under legal disabilities are beneficially interested. By one of the orders of the court, of 12th November 1856, all applications under the 12th, 16th, and 17th sections of this last-mentioned Act, where the infant is a ward of court, or the administration of the estate of an infant, or the maintenance of the infant is under the direction of the court, are to be made at chambers.

CHAPTER V.

SPECIFIC PERFORMANCE OF AGREEMENTS.

Principle
upon which
specific
performance
of agree-
ments is
enforced.

UPON the well-known maxim, that "equity looks upon things agreed to be done as actually performed," is founded the jurisdiction of the Court of Chancery in enforcing the *specific performance* of agreements: consequently, where a contract has been entered into for the sale of an estate, equity regards the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee for the vendor of the purchase-money;^a and it is of no consequence to the completion of the contract, that the vendor or vendee died before the day appointed for completing the contract.^b So if, between the articles for the purchase and the actual conveyance, any accident should happen to the property, either before or after the day appointed for the conveyance, the vendee must bear the loss; but, on the other hand, he will be entitled to any advantage which may arise therefrom.^c

Where a sale takes place before the master, the bidder is not considered as a purchaser until the report is con-

^a Sug. V. and P. 160.

^b Paul v. Wilkins, Toth. 106; Winged v. Lefebury, 2 Eq. Cas. Abr. 32, pl. 43.

^c White v. Nutt, 1 P. Wms. 61; Pain v. Mellor, 6 Ves. 349.

firmed, and is not liable, therefore, to any loss by fire or otherwise, which may happen to the estate in the meantime; nor is he, until such confirmation, compellable to complete the purchase.^d

But, although the court will enforce the specific performance of an agreement, notwithstanding the estate is destroyed, it is only in case a good title can be shown, or the purchaser has waived all objections to the title previously to the accident.^e A contract for sale is not discharged by the bankruptcy of the vendor or the intended purchaser.^f

Also, if money be directed to be laid out in the purchase of land, it is considered as land, and has all the incidents of a real estate. It will pass as land by devise,^g although the estate itself be not conveyed to the purchaser until *after* the execution of his will.^h

Under the Mortmain Act, 9 Geo. II. c. 36,* no real estate whatever, nor any interest therein, nor any personal estate whatever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given for any charitable use whatever. Mortmain Act;

This enactment extends as well to freehold, copyhold, or leasehold estates, as also to money charged thereon: so that not only is a devise of real estates to be sold for charitable purposes void under the Mortmain Act, but where there is even a contract for the sale of an estate at the date of the will, and the testator dies before the purchase-money is paid, the money will not pass by his will to the charity, although there is nothing under Effects of.

^d Sug. V. and P.

^e Ibid.

^f Ibid. 6 Geo. IV. c. 16, s. 82.

^g Green v. Smith, 1 Atk. 573.

^h Broom v. Monk, 10 Ves. 597.

* This is more properly an Act against *superstitious uses*, relating to death-bed alienations of real estates, or any interest therein.

the Act to prevent the bequest of pure personalty for charitable purposes. This may at first appear strange, when we refer to those equitable principles upon which the doctrine of conversion depends—namely, in considering that to be done which is intended to be done; as in the common instance, where money is directed to be employed in purchasing land, and land directed to be sold and turned into money, both the land and the money are to be respectively considered as that species of property into which they are so directed to be converted. Yet the restriction against the doctrine of conversion, in reference to charitable bequests, where the vendor dies before the purchase-money is paid, depends upon other reasons, namely, that so long as the money remains unpaid, the vendor has a lien upon the estate for the amount of the purchase-money, which is an interest in the land under the statute of mortmain.ⁱ Again, where there is a devise of real estates, with a direction that they should be sold, and the money arising from the sale is given to any particular person or persons, the objects intended to be benefited may come into a court of equity, and pray to have the land instead of the money; therefore it is, that such a direction on behalf of a charity, or for charitable purposes, is void under the 9 Geo. II. c. 36.^j

Reason for
passing the
Mortmain
Act.

“The reason of the statute,” says Lord Hardwicke, “was to hinder gifts by dying persons, out of a pretended or mistaken notion of religion,—as thinking it might be for the benefit of their souls to give their lands to charities, which they paid no regard to in their life-time; and therefore the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed, executed a year before the death of the grantor, and enrolled within six months

ⁱ *Harrison v. Harrison*, 1 R. and M. 71.

^j *Middleton v. Spicer*, 1 Bro. C. C. 201.

after execution, though this will render them them equally unalienable ; but the legislature blended the two inconveniences together,—the acts of languid and dying persons, and the disherison of heirs.”^k This statute not only requires that it be done by deed indented, sealed, and delivered a year before the death of the grantor, and enrolled within six months after execution, but also that its execution shall take place in the presence of two or more credible witnesses ; by these means securing every possible protection against a man alienating his property, while *in extremis*, to superstitious uses. Also to render such an alienation, as far as possible, removed from the nature of a devise, which may be revoked or altered at any time according to the will or caprice of the testator, the statute declares that such a deed shall contain no power of revocation. It would seem from the provision that the legislature intended to guard against any incautious disposition of land by deed for charitable purposes, and the soothing notion which at the time of execution the donor might entertain that he might revoke it at any time ; which intention, however, would be frustrated by sudden death, forgetfulness, or other causes. If such a liberty were given to settlors, it might operate as an inducement to any improvident disposition of lands for charitable purposes ; it therefore exhibits before the settlor at once the full consequences of his voluntary act.

The 11 & 12 Will. III., against Papists, puts the disability upon the person taking ; but the 9 Geo. II. c. 36, lays the disability upon the person devising.¹

It was said by Sir John Leach, V.C., in the *Attorney-General v. Harley*,^m that the object of the 9 Geo. II. c. 36, as its title imports, was to prevent land becoming

^k *Attorney-General v. Lord Weymouth*, Amb. 20.

¹ *Ibid.*

^m 5 Madd. 321.

CHAP. V. inalienable; but, in order to secure that object, the legislature thought it prudent not merely to prohibit the gifts of lands to charity uses, but to prohibit gifts to such uses of any interest in land, being aware that by circuitry and *election* the land itself might be acquired, in most cases, as the result of an interest in land. That money to arise from the sale of land is an interest in land admits of no doubt.

The Statute of Mortmain, 9 Geo. II. c. 36, being passed for purposes wholly political, arising out of local circumstances, does not extend to the island of Grenada in the West Indies. Its operation, therefore, is only local.ⁿ

Leasehold
bequests
void under
the Statute
of Mort-
main.

As to gifts by will of leaseholds to charitable uses, they are void, whether specifically bequeathed or included in a disposition of the residue, either by name or in a general description of the testator's personal estate.^o But, in the *Attorney-General v. Graves*,^p it was contended that the words of the statute, "any estate or interest whatever," only applied to a division of the testator's own lands, and not to that which he held as lessee. This distinction, however, was overruled on the annulling clause.^q

It has been held that, when an undefined portion of a fund is bequeathed to a *void* charity, and the residuary part of that fund is given for *legal* charitable purposes, but it cannot be ascertained how much was intended or would be required for the *illegal* object, the gift will fail altogether;^r but if they are not inseparable, and the

ⁿ *Attorney-General v. Stewart*, 2 Mer. 143.

^o 4 Ves. 732; 2 Eden, 207; Amb. 216, 155, 158 *n.*; *ibid.* 216; *White v. Evans*, 4 Ves. 21, 3 Madd. 467.

^p Amb. 155.

^q Shelf. on Mortm. 154.

^r *Chapman v. Brown*, 6 Ves. 404; *Attorney-General v. Davies*, 9 Ves. 535; *Limbrey v. Gurr*, 6 Madd. 151.

proportions are defined, or capable of being exactly calculated, the bequest may be supported.^s

But where a bequest of personal property for charitable purposes, which if standing alone would be valid, is connected with, and made dependent upon, the 9 Geo. II. c. 36, the devise being the principal, and failing, the accessory must fail with it.

In *Durour v. Motteux*,^t the testator directed his real estate to be sold, and, together with personalty, applied (*inter alia*) to charitable purposes, and directed the trustees to place out all the residue of his estate, and the interest thereon, on securities, and divide it among several persons,—Lord Hardwicke held, first, that the bequest to the charity was void, and next, that the whole, as to other matters, was turned into personalty, and, forming the residue, it included everything as a void legacy, or one one that has lapsed: and Sir John Leach, upon the authority of this case, held, in *Green v. Jackson*,^u that the failure of the charitable bequest inured to the benefit of the residuary legatees, and that *no distinction* could be made between that part of the residue which had arisen from the personal estate.

*Durour v.
Motteux.*

Mixed fund.

In one case it was contended that the particular charitable legacies ought, at all events, to be paid out of so much of the residue as consisted of pure personalty, which was amply sufficient for that purpose; but Lord Cottenham observed, “This would be marshalling the assets at least against next of kin, and would be contrary to the rule of the court, adopted in all such cases, which is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as

Marshalling
assets, not
allowed in
charitable
legacies.

^s *Blandford v. Thackerell*, 2 Ves. jun. 238.

^t 1 Ves. 320; 1 Sim. and S. 292 *n* (d); 1 M. and K. 661.

^u 5 Russ. 35; see *Roberts v. Walker*, 1 R. and M. 752.

CHAP. V. would in that way be to be paid out of the prohibited fund.”^v Where a testator has charged his estates generally with payment of his debts, charitable and other legacies, the following scheme for the administration of assets in reference to charitable bequests, deducible from the various cases, and from the general practice of the courts, may be relied upon for correctness in principle :—

Manner in which the court deals with a mixed fund in charitable bequests.

By making the real, the leasehold, and the personal estates one common fund for the payment of his debts, general and charitable legacies, the testator shows his intention that each estate shall bear its proportion of each payment; but the law does not allow the payment of charitable legacies out of real estates, or estates savouring of reality—such as leaseholds: therefore, although there might have been originally sufficient out of the pure personalty to answer all the calls of creditors, of general and also of charitable legatees, yet, as the testator intended each estate to contribute rateably, the court, before paying anything to the charitable legatees, will ascertain what proportion of them was, with reference to this intention, payable out of the pure personal estate, and will only allow them such proportions of their legacies as would thus have fallen upon the pure personal estate. So that, as is the aggregate fund *intended* by the testator to be charged to the fund *the law allows* to be charged, so is the full amount of the legacy to the sum which the law will pay out of the pure personalty. Thus, suppose the real estate to be worth £3000, the mixed £2000, and the pure personal to £1000, and the testator gives a charity legacy of £300 chargeable upon the whole of his property, then, under the above calculation the charity will only gain £50.

^v Williams v. Kershaw, 1 Keen, 274 n.; Seton's Or. 128; Attorney-General v. Southgate, 12 Sim. 77; Philanthropic Society v. Kemp, 4 Beav. 581.

Where a sum of money was directed to be laid out in building a church, it was considered to be void, as a direction to build includes a direction to purchase for the purpose of building, unless the testator distinctly refers to land already in mortmain.^w But a bequest out of a real estate to erect a monument in a church to the testator's memory is not within the Mortmain Act.^x Also, a good charitable bequest may be made, to be laid out on land to be afterwards acquired, not by means of that money, but by gift or otherwise; that is, if the donees were directed to hire or beg the land. And it has been recently determined in the House of Lords, that a gift by will of money for the maintenance of almshouses, if within a year from the death of the testator, another person should give land and build the almshouses, does not come within the operation of the Mortmain Act; and therefore it was held to be a good bequest where it appeared from the instrument itself that the intention was, that the money should be laid out only on land generally, already in mortmain, and that a bequest of £60,000 out of pure personalty, to be paid to trustees of contemplated almshouses, provided any person should within twelve months after the testator's decease, purchase or give land as a site for the above purpose, did not militate against its provisions.^y

It will here be remembered that, as much of the severe caution which the courts in their interpretation of, and their endeavours to carry out, the spirit of the Mortmain Act, has arisen on account of the subtle doctrine of *conversion*—which doctrine owes its existence to the equitable principle contained in the maxim which com-

CHAP. V.

Money devised to build a church, void.

Conversion; what.

^w Pritchard v. Arbouin, 3 Russ. 456.

^x Mellick v. Asylum, Jac. 181.

^y Philpott v. St. George's Hospital, 6 Dom. Proc. House of Lds. Cas. 338; W. R. 1856-7, 845; 3 Jur. N. S. 1269.

CHAP. V. menced the present chapter—it may not be amiss to say a word or two more upon the subject of conversion, especially in its connection with that of the Mortmain Act.

It has been already noticed that, where money is directed to be laid out in the purchase of land, it is by a court of equity considered as converted into real estate; but if a testator direct his real estate to be sold, and the produce, or any part of it, to be applied for a particular purpose *only*, which fails, the money intended for that purpose retains the quality of real estate and belongs to the heir:^z when, however, the purpose is ulterior to the payment of the legacies on behalf of the prohibited objects, namely, the purpose of division among certain persons described in the residuary gift, those legacies will inure for the benefit of the residuary legatees. No distinction was therefore made between that part of the residue which had arisen from the real estate and that which had issued from the personal estate; and it was settled, before the case of *Kennell v. Abbott*,^a that, if an estate be devised charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate.

7 Will. IV.
and 1 Vict.
c. 26.

And now the question is more clearly settled by the 25th sec. 7 Will. IV. and 1 Vict. c. 26, the New Wills Act, which provides that, unless a contrary intention shall appear by the will, such real estate, or interest therein, as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise *being contrary to law*, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

^z *Gibbs v. Rumsey*, 2 V. and B. 294; *Henchman v. Attorney-General*, 3 M. and K. 485; *Green v. Jackson*, 5 Russ. 38.

^a 4 Ves. 802.

This section, it will be seen, relates only to lapsed devises of *real* estates. It was already the law as regards residuary bequests of personalty.^b

In its general operation the section has been held to extend to all bequests which are charged upon or which savour of realty, such as mortgage-money, bequests of money charged on or to arise from the sale of real estate, terms of years, money secured on turnpike tolls or on the poor or county rates; also shares held in the New River Company, which as an old corporation have been held to be real estate.^c But where certain property has by Act of Parliament received the stamp of personalty, such as shares falling within the 8 Vict. c. 16, s. 7, "The Companies Clauses Consolidation Act," which are declared to be personal property; arrears of rent;^d shares in joint-stock companies, as canal, dock, railway, water-works, gas-light, and banking companies, etc., these are not within the statute 9 Geo. II. c. 36, although real estate may form part of their property whether the company be incorporated or not.

Formerly, a person who would have been entitled to the land if purchased as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery. This inconvenience was removed by 7 Geo. IV. c. 45, repealing the Act 39 & 40 Geo. III. c. 56, intituled "An Act for the Relief of Persons entitled to Entailed Estates to be purchased with Trust Moneys," which Acts provided that, in all cases where money under the control of any court of equity, or of which trustees were possessed, should be subject to

^b Jones *v.* Mitchell, 1 S. and S. 294.

^c Wms. Ex. 5th edit. 956; Wordsw. Joint Sk. Co. 5th edit. 359.

^d 25 Law Jour. R. Ch. 86.

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be invested in the purchase of freehold or copyhold lands to be settled in such manner that it would be competent for the persons who would be the tenants in tail of any estate therein, either alone or with the owners of any particular estates therein, to bar such estates tail and remainders, it should not be necessary to have such money actually invested in lands ; but a court of equity, on the petition of the person who would be tenant of such estate tail, and the party having any antecedent estates (being adults or *femes covert* separately examined), might order such money to be paid to them, or applied as they should appoint.

3 & 4 Will.
IV. c. 74.

The 71st section of the 3 & 4 Will. IV. c. 74, for abolishing fines and recoveries, provides that the previous clauses in the Act, so far as circumstances will permit, except copy of court roll, shall apply to lands of any tenure to be sold, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled in tail ; and also money subject to be invested in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of the Act, be treated as lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to.

Object of
71st sect. of
3 & 4 Will.
IV. c. 74.

The object of the section (the 39 & 40 Geo. III. c. 56, and 7 Geo. IV. c. 45, being repealed) is to make the substitute for fines and recoveries applicable to money to be laid out in land to be entailed, and to allow it to be unfettered by the same process as the land itself would be if purchased. Fines and recoveries could not, from their nature, be made to apply to money, and consequently an application to the Court of Chancery was the costly expedient resorted to ; but the same objection does not apply to the substitute. When, by means of

the substitute, the money is discharged from the entail and remainder, or, as may sometimes happen, from an entail only, the trustees will, if the money should be discharged from all interests and charges subsequent to the entail, and there shall be none such subsisting either upon the interest in tail, or prior thereto—pay it over immediately to the person barring the entail, and will, if there should be interests and charges still subsisting, hold it in trust for the person barring the entail; and the persons entitled to such interests and charges, if the money should be in court, on producing evidence that the person barring the entail is entitled to it, receive it.^e

If the vendor die before the payment of the money for which the estate was agreed to be sold, it will go to his personal representatives, and form part of his assets, and not to the heir-at-law, who, if the estate be not yet conveyed, will be decreed to perform the agreement in specie, although the vendor covenanted for himself only, and not for his heirs: and the reason is that, as soon as the contract is entered into, the vendor is considered to have changed the land into *money*, and the purchaser to have changed his money into land:^f but until the 1 & 2 Vict. c. 110, if an agreement had been entered into by a tenant in tail for the sale of his estate, although binding on himself, yet it could not have been enforced against the issue in tail, unless they were absolutely barred;^g because the issue in tail claim *per formam doni* from the creator of the estate tail, and therefore although it was in the power of the tenant in tail to dock the entail by a particular mode of conveyance (formerly by fine or recovery, but now by enrolment),—that not being done, the court

Effect of conversion as to real and personal estate.

^e 1 Real Prop. Rep. 36.

^f *Atherley v. Vernon*, 10 Mod. 518; *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 272; *Paul v. Wilkins*, Toth. 106.

^g *Cavendish v. Worsley*, Hob. 203.

CHAP. V. could not have deprived them of the right they derived, not from the tenant in tail, but from the author of the estate tail.^h The 11th section, however, of that statute, for the sake of giving judgment creditors more effectual remedies against the real and personal estate of their debtors, directs that a judgment, duly registered, shall operate as a charge upon all lands, tenements, rectories, tithes, etc., as the debtor, or any person in trust for him, should have been seized or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person should, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, *without the assent of any other person*, exercise for his own benefit.

The above example appears to form an exception to the general rule in equity, that what is contracted to be done is to be considered as actually performed: another exception is where, under a mere contract for the sale of an estate, the purchaser will not be allowed to fell the timber growing thereon before he has paid the purchase-money.ⁱ

Conversion
applicable to
immediate
parties only.

The principle, that by a contract of purchase the purchaser becomes in equity the owner of the property, applies only as between the parties to the contract, and cannot be extended so as to affect the interests of third persons: therefore, before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.^j It was upon this ground, also, that Lord Eldon, in *Mole v. Smith*,^k stated, that where a bill is filed for a specific performance, it ought not to be mixed up with a prayer

^h V. and P. 184.

ⁱ *Crockford v. Alexander*, 15 Ves. 138.

^j *Tasker v. Small*, 3 My. and C. 70.

^k Jac. 490-4.

for relief against other persons claiming an interest in the estate. CHAP. V.

An agreement by a joint tenant for sale of his share against the survivor will be enforced in equity, provided the articles amount to an equitable severance of the jointure; and a covenant to sell will sever the joint tenancy in equity although not at law.¹

Where an agreement consists of two parts, and one of them cannot be enforced, the Court of Chancery will nevertheless compel the performance of the other part, where it is quite distinct, and mainly founded on a distinct valuable consideration, although the part which cannot be enforced may have formed part of the inducement to enter into the other part which is enforced.^m

The object of a court of equity in decreeing a specific performance of agreements, which are founded in *bond fide* considerations, is for the sake of giving the party seeking redress a more perfect remedy than was allowed him in a court of common law, in which he could only recover damages for a breach of the contract, without being able to enforce its completion: and this branch of the chancellor's equitable jurisdiction is, by Lord Hardwicke, said to be the most useful one; for a court of equity interferes on this ground, namely, that the party who has entered into a covenant is, in conscience, bound, not only to make compensation for the breach, where he is unable to perform it, but also actually to perform it when it shall be in his power.ⁿ This, however, extends only to such contracts, the specific performance of which is essential to justice, and where the legal remedy is *defective*; for if damages for a breach of the covenant be all that justice can require, as in the case of a contract

¹ Sug. V. and P.

^m Rolfe v. Rolfe, 10 Jur. 61; 6 Law Times, 518.

ⁿ Alley v. Deschamps, 13 Ves. 228.

CHAP. V. for stock in the public funds, equity will not interpose.^o

But the sale of an annuity payable out of dividends of a particular stock, or of the right to a dividend upon a bankrupt's estate, or even a contract for stock, where the object is to obtain delivery of certificates which confer the legal title to it, may be enforced in equity.^p

Specific performance not decreed where there is no legal competency.

When a party is called upon to do an act which he is not lawfully competent to perform, equity will not enforce the agreement, for that would expose him to another action for damages at the suit of the person injured by such act; therefore, if a bill be filed for the specific performance of an agreement made by a man who appears to have a bad title, he is not compelled to execute it unless the party seeking performance be willing to accept of such a title as he can give, and that only where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give: "The reason," said Lord Redesdale, "among others, I take to be this,—not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person."^q

Where also, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged, this is another ground in which courts of equity refused to enforce specific execution of agreements.^r

Where vendor has no title.

If a *bonâ fide* vendor has no title to the estate which forms the subject of contract, the court will leave the purchaser to his remedy upon the articles at law, where,

^o Mitf. Tr. Pl. 118, 119.

^p Sug. V. and P.; Clifford v. Turrell, 14 Law Journ. N. S. Ch. 390.

^q Harnett v. Yielding, 2 Sch. and Lefr. 554.

^r Ibid.

generally speaking, he would obtain nominal damages.^s It is not necessary that a vendor should have the legal estate, to enable the court to decree a specific performance; it is sufficient if he have an equitable title.^t

If, however, a party enter into a contract to sell an estate, and it turns out that he is unable to complete his contract, but is nevertheless able to perform a part of it the court will compel him, if the purchaser choose, to execute as much of the contract as he is able; for, generally, a purchaser is at liberty to take what he can get out of the bargain, with compensation for what he cannot have, provided deficiency can be accurately ascertained and the compensation estimated, unless the performance would be unreasonable, and prejudicial to persons interested in the property, but who are not parties to the contract.^u

Part of a contract enforceable though not the whole.

Sometimes, in a written agreement, there is a penalty inserted in the event of non-performance; but this does not give a party the option of paying the penalty, and so relieve himself from the performance of the agreement: thus, where in articles for the purchase of an estate, there was a provision that if either broke the condition, he should pay £100 to the other, on forfeiture by one of them, Lord Hardwicke decreed a specific performance.^v

Penalty for non-performance.

If, after an agreement for the sale of an estate, either of the parties wish to compel the other to observe the contract, he must make his own part of the agreement precedent; for he cannot take proceedings against the other without an actual performance of the agreement on his part, or a tender and refusal. Thus, the vendor can-

Party wishing to enforce an agreement must do what he can on his own part.

^s Sug. V. and P.

^t *Averne v. Browne*, 14 Law Jour. N. S. 30; 1 Verulam Real Prop. Rep. 162.

^u *Thomas v. Dering*, 1 Ke. 743; V. and P.

^v *Howard v. Hopkins*, 2 Atk. 371.

CHAP. V. not bring an action for the purchase-money without having executed the conveyance, or offered to do so; on the other hand, the vendee cannot maintain his action for a breach of covenant, without having tendered a conveyance and the purchase-money, unless, indeed, a bad title be produced; for, in that case, the purchaser may maintain an action for recovery of his deposit, without tendering his conveyance.^w

*Nudum
pactum;*
what.

It may be well to observe that a contract which involves no consideration is called a *nudum pactum*, or a mere naked promise, *ex quo non oritur actio*; and it is immaterial whether it be in writing or not. Our law recognizes no distinction between a written contract and a verbal agreement. There is therefore no intermediate order of contracts known as contracts in *writing*; for, by the English law, all contracts are divided into agreements by *specialty* and agreements by *parol*. If they be not specialties, viz. contracts under seal, they belong to the other class of contracts, denominated *parol*, whether reduced into writing or not, and require proof of consideration to enforce their performance; so that, where the term "written agreement" merely occurs, as it often does, it is only to be understood as a *parol* agreement, reduced into writing for the sake of greater proof of the intention of the parties, or for satisfying the Statute of Fraud, or the statute 9 Geo. IV. c. 14, commonly called "Lord Tenterden's Act."

As to
specialty
and parol
agreements.

Rules as to
specific per-
formance.

Agreements which the court will decree to be specifically performed must be—1. According to the forms prescribed by law; 2. Between parties able and willing to contract; 3. They must be certain and defined, equal and fair. These may be considered as of the contract, which cannot be dispensed with, and without which it cannot subsist.

Statute of
Frauds.

1. With regard to the first requisite, namely, agree-

^w V. and P.

ments which must be according to the forms prescribed by law; these forms depend upon the statute 29 Car. II. c. 3, stat. 4, usually denominated the Statute of Frauds; which provides, among other things, that no action shall be brought, whereby to charge any person upon any agreement made upon any consideration of marriage, or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, be in *writing, and signed by the party* to be charged therewith, or some other person thereunto by him lawfully authorized. By a liberal interpretation of this clause of the statute, a letter containing the terms of the agreement, the consideration, and the subject-matter of contract, or referring to any writing containing them, even though the writer did not intend to bind himself, has been held sufficient;^x but the court will not enforce the specific performance, unless a fair inference may be deduced from the letter, that it imports a concluded agreement.^y

It was once held that specific performance could only be had where damages for breach of the contract would lie at law, upon the principle that equity will never make that a good agreement that is not good at law.^z But there are cases in which the court will perform an agreement in specie, notwithstanding no action would lie at law.^a

There have been cases wherein a contract in writing has been dispensed with, notwithstanding the requirements of the statute, as where a *parol agreement* has been

Specific performance decreed in equity, though no action would lie at law.

Part performance.

^x Kennedy v. Lee, 3 Meriv. 441.

^y 1 Madd. Ch. 482; Huddleston v. Briscoe, 11 Ves. 591; Stratford v. Bosworth, 2 Ves. and Beav. 346.

^z 2 Freem. 217.

^a Ibid. 246; Mitf. 116; 1 Fonbl. 149.

CHAP. V. *in part performed*, where it was admitted or proved that it was that very agreement which was partly executed;^b and it is on this ground of fraudulent dealing that the court grants relief in these cases,—*i.e.* by not allowing one party to proceed in the contract, and then take advantage of the statute, by insisting on its not being in writing.^c

Sale under a decree in chancery.

Although a purchaser did not subscribe any agreement, a sale, under the decree of the Court of Chancery, will be carried into execution. The judgment of the court takes it out of the Statute of Frauds. In case, also, the contract is prevented by fraud from being put into writing, it will take the case out of the operation of the statute.^d

What is required in enforcing a partly performed parol agreement.

Whenever the aid of the court is sought for the purpose of establishing a parol agreement, on the ground of part performance, it must not only be shown what the agreement itself was, but that the proceedings alleged, by way of partial performance thereof, did not constitute merely a voluntary act, or a step introductory to the contract,^e but were done in part execution of the substance of the agreement, formed a necessary portion of it, and were such that the parties would suffer an injury equivalent to fraud, in consequence of a refusal to perform that agreement in specie. The principle of the cases is, that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted to show what the agreement is.^f

Part performance; what.

If the vendor on a parol agreement for the purchase of

^b *Lindsay v. Lynch*, 3 Sch. and Lefr. 8.

^c *Savage v. Foster*, 2 Mod. 35.

^d Sug. V. and P.

^e 1 Bro. C. C. 412; *Lacon v. Mertins*, 3 Atk. 4.

^f *Frame v. Dawson*, 14 Ves. 386.

lands let the vendee *into possession*, this has been held to be a part performance, especially where the party, on being admitted into possession, has laid out money in improving them.^g

Whether payment of money, either in full, or merely in part, *i.e.* by way of earnest for the subject of contract, amounts to a part performance, has been a much disputed point. Lord Redesdale, in a case which came before him,^h stated his opinion, that the payment of money is not a part performance; yet there, as was observed by the master of the rolls, in *Frame v. Dawson*, the act can hardly be said to be equivocal in its nature, as the payment of a price presupposes a sale, but the money may be repaid, and the parties are restored to their former situation.

The defendant to a bill filed for specific performance of a parol agreement may, notwithstanding he has by his answer admitted the agreement, insist upon the Statute of Frauds, which will be a good defence; but if he, by his answer, submit to perform the parol agreement,ⁱ or, having admitted such agreement, he do not submit to perform it, nor yet insist upon the statute, he is taken to have renounced it, and a specific performance will be decreed.^j

Covenants which are said to run with the land will, in a court of equity, be decreed to be specifically performed, either for or against successive owners of the land;^k but the common covenants in a lease will not be specifically enforced in a court of equity: the proper remedy for breach of them is at law.^l

^g *Hawkins v. Holmes*, 1 P. Wms. 770; *vide* 3 Ves. 378.

^h *Clinan v. Cooke*, 1 Sch. and Lefr. 40. ⁱ *Amb.* 586.

^j *Cooth v. Jackson*, 6 Ves. 37; *Moore v. Edwards*, 4 Ves. 24.

^k 1 Eq. Cas. Abr. 473.

^l 1 Madd. Ch. 516.

CHAP. V.

Agreement
for other
parties over
whom the
covenantor
has control.

It is laid down as a general rule that, where a person stipulates to perform that which it is either in his own power to do, or in the power of others over whom he can exercise control in that behalf, the court will compel him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so.^m Thus, a married man has been ordered to procure the acknowledgment by his wife of a fine in mortgaged lands.ⁿ But if the husband, after entering into a contract for his wife, alleges an absolute inability to perform his covenant, and offers to put the party in the same situation as if the agreement had never taken place, a specific performance will not be decreed.^o

Maxim—
“He who
seeks equity
must do
equity.”

We have before observed that, if one party wish to compel a specific performance by the other, he must make his own part of the agreement precedent. So, if a plaintiff apply for the aid of a court of equity, he must come into court with clean hands; for, “he who seeks equity must do equity:” therefore if a party file his bill for specific performance, and it can be shown, even by parol evidence, that there has been any mistake, or omission, or unreasonableness, fraud, surprise, concealment, misrepresentation, whether wilful or not, or unfairness, as in case of intoxication, attending the transaction; in any of these cases the plaintiff’s bill will be dismissed.^p And notwithstanding there may be a *valid legal* contract, yet if it be tainted with fraud, or mistake, or surprise, materially affecting the whole substance or character of the transaction—or if uncertainty or great hardship appear—or if there have been unreasonable delay in the party seeking the assistance of the court, or a want of mutua-

^m Costigan v. Hastler, 2 Sch. and Lefr. 166.

ⁿ Rust v. Whittle, Toth. 94.

^o See what is said in Morris v. Stephenson, 7 Ves. 478.

^p 1 Madd. 405.

lity—or if the parties be legally incompetent to fulfil the contract, or there be no consideration, or at best only an inadequate consideration—equity will relieve.^q

Upon this favourite maxim, *i.e.* that “he who seeks equity must do equity,” the court has assumed a most wholesome and provident jurisdiction of giving relief, and affording maintenance to those who, under the strict rules of the courts of law, would, in the absence of any indiscretion on their own part, be left remediless:—thus, in the case of insolvency of the husband, where the wife’s life estate, which she may have in property, is attainable by the husband, or the assignee of the husband, at law, the severity of the law must prevail; yet if it cannot be reached except through the intervention of the court, equity, although it avoids giving offence to the courts of ordinary jurisdiction, and thus follows the law by granting to the husband, or his assignees, the wife’s estate, will nevertheless withhold its assistance till it has imposed certain conditions, which in fairness and justice ought to be performed, and refuses to hand over to the assignees of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both, until it has secured to the wife the means of subsistence.^r

If an agreement be fair and reasonable at the time of its commencement, any subsequent increase or depreciation of value will not be a ground to impeach the transaction or resist a specific performance of the agreement, provided the parties acted with full knowledge of the nature of the property and its possible liability to fluctuate in value.^s

If agreement originally fair, not to be set aside.

^q *Atk. Mark. Titles*, 83.

^r *Sturges v. Champreys*, sittings at West., Nov. 7, 1839, *Mont. and Ayr. B.* 616; see also *Bauerman v. Radenius*, per Lord Kenyon, 5 *East.* 663; *Gardner v. Marshall*, 5 *Law Times*, 233.

^s *Revell v. Hussey*, 2 *Ball and Beav.* 287.

CHAP. V.

Bill for specific performance to refer matters to arbitration not entertained.

But a bill for the specific performance of an agreement to refer matters to arbitration will not lie; if the court be not party to the agreement, it cannot give the arbitrators authority to examine upon oath. Moreover, neither a court of law nor equity will enforce an agreement which might have the effect of ousting them of their jurisdiction.^{t*}

Parties attempting to shield themselves under the rules of the court, from the consequences of their own acts, not favoured.

But notwithstanding, as a general proposition, an agreement to refer disputes to arbitration will not deprive the court of its jurisdiction, nor bind the parties before they seek its aid, the court will not look very favourably upon a person who insists upon its protection against the effects of his own contract, before he has attempted to settle the point of dispute by the means the parties had already agreed upon.^u

Sale of the goodwill of an attorney's business.

With regard to the sale of the goodwill of an attorney's business, it was decided, in the case of *Bunn v. Guy*,^v to be valid where the contract was attended with partial restrictions on the practice of the vendor, such as not practising within a certain distance, etc. Against the contract there were the following objections raised:—1, That the deed was without consideration, the goodwill of an attorney's business being personal, depending upon his integrity and skill in his profession, and therefore not capable of transfer; 2, That the permission by the vendor to the purchasers to use his name as attorney was contrary to the policy of the law—it being inconsistent with his duty as an officer of the court, which was a personal trust; 3, That the agreement to recommend the

^t *Kell v. Hollister*, 2 Bos. and P. 131; *Street v. Rigby*, 6 Ves. 818; *Agar v. Macklew*, 2 S. and S. 418; *Wilks v. Davis*, 3 Meriv. 507.

* But *vide* 11th section of the C. L. P. A. 1854.

^u *Waters v. Taylor*, 15 Ves. 10.

^v 4 East. 190.

purchasers was contrary to morality—being absolute, and not “provided they continued worthy of the recommendation.” CHAP. V.

The above case was sent from the Court of Chancery to the King's Bench, for the opinion of the judges in that court; the question being whether the contract was good at law, so that the vendor could recover the money stipulated to be paid for the business in an action against the purchasers. The court, upon hearing the arguments, overruled the above objections, and certified in favour of the validity of the deed. Lord Eldon, in a subsequent case,^w referring to this certificate in *Bunn v. Guy*, says, “It has happened to me to know that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that, consistently with the policy of the law, agreements could not be made by which they contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, *but for a sum of money paid and advanced*. I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion; though I *never could entirely reconcile myself to their doctrine*.” It is clear, from the just sarcasm couched in this declaration, that his Lordship considered the practice of selling an attorney's business might have a most pernicious tendency, and that the certificate of the learned law judges did not exactly coincide with his own opinion upon the subject. Bunn v. Guy.

In the case of *Bozon v. Farlow*,^x specific performance of an agreement to purchase the business of an attorney was refused, at the instance of the vendor; there being no express stipulation by which the court might be en- Bozon v. Farlow.

^w *Candler v. Candler*, 1 Jac. Rep. 231.

^x 1 Meriv. 459.

CHAP. V. abled to carry it into effect on his part in return for the defendant's purchase-money; and there being no conditions generally applicable to transactions of this nature, so as to come within the description of "usual clauses," to be inserted in an instrument to be drawn up in pursuance of the agreement. The Master of the Rolls, Sir W. Grant, in his judgment, alluding to the main facts of the case, and the principle upon which specific performance is enforced by the court, says, "the defendant agrees to give £3075 for the plaintiff's business, and the plaintiff agrees that, at a certain period, his business shall be transferred to the defendant. Now the business of an attorney consists in his being employed by others from the confidence which they repose in his skill and integrity. In what way then is the court to decree the transfer of such a business? What is it that I am to direct Mr. Bozon (the vendor) to do, towards the fulfilment of his part of the contract? The court must be able to prescribe to both parties what it is that they are reciprocally to perform. *The very ground on which the jurisdiction of a court of equity, in decreeing a specific performance, is founded, is that it is able to give possession of every thing which is the subject of the agreement, and which a court of law cannot do.* But when I order Mr. Farlow (the purchaser) to pay his £3075, in what way am I to proceed in order to put him in possession of Mr. Bozon's business? What act am I to direct Mr. Bozon himself to perform, in order to effect that purpose?"

The last-mentioned judge, at the same time, also alluding to the case of *Bunn v. Guy*, said, there was no occasion to consider whether the agreement could be specifically performed; the only question was, whether a legal consideration existed for the securities that had been actually executed. "In that case, however," continued the learned judge, "there were means devised by

which Mr. C.'s (the vendor's) business might have been made to pass into the hands of the other parties; for it was stipulated that he should not in future practise as an attorney within a hundred and fifty miles of London; that he should permit his name to be used in the firm for a considerable time after he quitted the business; lastly, and principally, that he should endeavour, by all the means in his power, to influence and induce his clients to become the clients of Bunn and Guy. The lord chancellor doubted not only the propriety, but the legality, of some of those conditions; and, though it was ultimately determined that they were not illegal, I think he would hardly have decreed them to be specifically executed."

If there have been very gross laches in parties entitled to a specific performance of an agreement, or, in other words, where they have for a long time slept upon their rights, a specific performance has been refused; for he who claims the aid of the court to enforce a contract in specie, must prove himself to have been "ready, desirous, prompt, and eager to fulfil it;" but what length of time must necessarily expire before the contract shall be dissolved seems to depend much upon the nature of the agreement and the circumstances which attend it. Thus, where there is a contract for the sale of a reversion, and part of the terms is that the money shall be paid at a fixed time,—if it be not so paid, by default of the purchaser, the vendor is discharged from his contract; for no man who is not in distressed circumstances would sell a reversion: and it would frustrate the very object he had in view if he were entitled only to interest on the purchase-money during the delay.^y

Consequence
of gross
laches.

In general, if the vendee do not pay the purchase-money at the time fixed, he will be chargeable with interest

As to
interest

^y Newman v. Rogers, 4 Bro. C. C. 391.

CHAP. V. thereon at four,^z and sometimes even five per cent.,^a and will be bound to endure any losses the estate may sustain, but will be entitled to any profit which may accrue in the meantime, whether he does or does not enter into possession.

at law and in equity.

Where interest is recovered at law it is always at the rate of £5 per cent., but in a court of equity £4 per cent. is the usual interest allowed.^b

Parties able and willing.

2. The parties must be *able and willing to contract*; therefore an agreement by a *feme covert*, for the sale of her estate, cannot be enforced either at law or in equity, unless the estate be settled to her separate use, so as to empower her to dispose of it as if she were sole: and no agreement entered into by her husband for his wife, in respect of her property, will be binding on her,^c unless he first gain her consent.

Lunatic cannot contract.

An agreement by a lunatic cannot be carried into execution; but the subsequent change of the mental condition of a person who has entered into an agreement, by becoming lunatic, will not affect the rights of the parties.^d

Mutuality of remedy necessary in contracts.

To enforce the specific performance of agreements the remedy must be *mutual*; therefore, if an infant enter into a contract for the sale or purchase of an estate, he cannot enforce it in equity, for the remedy is not mutual: but although an infant is not bound to complete a contract, yet if he enter into a contract for the purchase of an estate, and pay a deposit, he cannot, by declining to complete the purchase, recover the deposit; that is, supposing he was not induced by fraud to engage in such contract.^e

^z Child v. Lord Abingdon, 1 Ves. jun. 94.

^a Waldron v. Forrester, Excheq. 30th June, 1807.

^b Sug. V. and P.

^c Ibid.

^d Ibid.

^e Sug. V. and P. See Vansittart v. Vansittart, 4 K. and J. 62.

Neither will the court decree a specific performance of a contract made when one of the parties was in a state of intoxication, and it makes no difference that the party was not inveigled into drink by the plaintiff.^f

CHAP. V.

Intoxication will vitiate a contract.

3. The agreement must be *certain, defined, and equal*, otherwise the court cannot decree a specific performance. Thus, where a tenant in tail, with a power to make a jointure of lands situate in the several counties of A., B., and C., in consideration of marriage and a portion which he received with his wife, covenanted by articles before marriage to settle a jointure, but without saying out of what lands in particular, and died before any settlement was made, the wife having also died, her executrix filed her bill for an account of the profits of the lands agreed to be settled, the bill was dismissed.^g

Certainty and equality of agreement.

The agreement must also be *fair*; that is, the consideration must not be *inadequate or unreasonable*,—for a specific performance of a contract will not be decreed if the party against whom it is sought to be enforced can show that the price was very unfair, or unconscionable;^h but the agreement, if impeached, must be so at the time of its commencement, for any casual accident happening to the property subsequent to the agreement will not form a ground of objection to the specific performance, unless, by means of such accident, the property has become so changed that it cannot be enjoyed in manner prescribed by the agreement itself.ⁱ

Must be fair and reasonable.

^f 1 Madd. 303 ; and see *Malins v. Freeman*, 2 Keen, 34.

^g *Elliot v. Hele*, 1 Vern. 406.

^h *Barnardiston v. Lingood*, Barn. 341 ; S. C., *Collett v. Woolaston*, 3 Bro. C. C. 228 ; Vin. Abr. tit. "Contract and Agreement," (P.) Ca. 10 and 12.

ⁱ *City of London v. Mitford*, 14 Ves. 41.

CHAPTER VI.

TRUSTS.

Trusts.

PERHAPS there is not any part in the chancellor's jurisdiction in which he is called upon to exercise a more exclusive and extensive authority, than in matters of trust: and notwithstanding the doctrine of trusts, which are said to be creatures of equity, was unknown to the common law, yet they have been gradually settled and moulded into a certain system, and are governed by nearly the same rules which are applicable to an estate at common law.^a

Description
of a trust.

A trust bears almost an exact resemblance to what a use was before the statute (both arising out of the same court), with this exception: the uses regarded land only; and it was held that nothing could be granted to a use, whereof the use is inseparable from the possession, "*quæ usu consumuntur*," or whereof *seisin* could not be instantly given, and therefore could not be granted of personality, such as terms of years or other chattel interest, whereof the termor is not *seised* but only *possessed*; but trusts may be created either of real or personal estates.

Uses.

As uses paved the way for trusts, it may not be unnecessary to trace in a few words the progress of both one

^a 2 P. Wms. 645, 668, 669.

and the other. Uses and trusts, then, derived their origin from the same source, *i. e.* the *fidei commissum* of the Civil Law, introduced by Augustus, which was the grant of an inheritance to one in trust, that he should convey it or dispose of the profits at the will of another. This created a right in the party at whose disposition the estate was held in confidence, called the *jus fiduciarium*, which might be enforced by the prætor especially appointed for that purpose, styled the *prætor fidei commissarius*.^b

The *fidei commissum* until the time of Augustus was left entirely to the honour and good feeling of the person in whom the trust was reposed. This emperor, by reason of the abuses which in too many instances were committed by persons unworthy of the confidence reposed in them, instituted a jurisdiction to enforce these trusts in conscience. It may at first sight appear somewhat strange that a person, for the sake of benefiting his own family, should voluntarily place his estate and property into the hands of an irresponsible person, relying solely upon his honesty and integrity for the due performance of the trust, rather than give the property at once to his family, or to those whom he intended as objects of his bounty; but the *fidei commissum* was originally a practice invented for the purpose of evading one of the prohibitory laws of the Roman Republic which related to successions and legacies, and more especially the Voconian law, which precluded any person who happened to be included in the census from appointing a female or even an only child as heir. To obviate this hardship, and to ensure as far as possible the intention of the testator, it became the custom to constitute by will a qualified citizen as *hæres*, with a request* that he

Fidei commissum;
what.

^b Inst. lib. 2, l. 23.

* The words chiefly used in the *fidei commissum* were *peto, rogo, volo, mando, fidei tuæ committo*.—Just. Inst. lib. 2, t. 24, s. 3.

CHAP. VI. — would convey the inheritance or restore the legacy to some persons or person pointed out by the testator who could not take it under the will.*

*Prætor fidei
commissarius.*

Augustus having brought this species of trust under a judicial cognizance by the appointment of a *prætor fidei commissarius* at Rome, to give judgment in these cases of conscience, a similar jurisdiction was exercised over them by the præses in the provinces, but without the formalities exercised in conducting the pleadings in the courts of judicature.^c

Doctrine of
trusts; by
whom intro-
duced into
England.

This fiduciary doctrine from the Roman law was, we are told, first introduced into England by the foreign ecclesiastics, who being keen adepts in evading the various statutes enacted from time to time for the purpose of stemming their successful encroachments upon the fair territories of this island, and being well versed in all the subtle refinements of the Civil and Canon Laws, applied the Roman doctrine of the *fidei commissum* to evade the statutes of mortmain, by obtaining grants of land, not to their religious houses directly, but *to the use* of such houses, which the chancellors, who were in those days of the clerical order, held to be *fidei commissa*:^d and as they were not enforceable by any legal remedy to be binding on the conscience of the nominal feoffee to account to his *cestui que use* for the profits of the estate, the *cestui que use* was thus thrown entirely upon the conscience and

* “Quibus enim non poterant hæreditatem vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento poterant. Et ideò fidei commissa appellata sunt quia nullo vinculo juris sed tantum pudore eorum, qui regebantur, continebantur. Postea Divus Augustus primus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere.”—Ibid. t. 23, s. 1.

^c Spence, Eq. Juris. 437.

^d Bl. b. ii. 328; Doc. and Stud. c. 22.

good faith of his trustee; and hence, from the reign of Henry IV., *feoffments to uses* became a most profitable source of business for the interposition of the Court of Chancery.^e And, although the equitable jurisdiction of the Court of Chancery did not arise out of these circumstances, still it is very evident that they greatly assisted in its development.^f The doctrine of *fidei commissa*, or uses, unknown to the common law, was introduced about the latter end of the reign of Edward III. In succeeding reigns the legislature was employed in framing statutes and passing laws to remedy the inconveniences which were felt in every quarter; the provisions of which all tended to consider the *cestui que use* as real owner of the estate, and allowed actions in respect of the estate to be brought against him, if in actual enjoyment of the rents and emoluments, without regard to his nominal feoffee, until the statute 27 Hen. VIII. c. 10, called the *Statute of Uses* or the statute *for Transferring Uses into Possession*, carried this idea of absolute ownership into full effect.

By this statute it was provided that “when any person shall be *seised* of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, for years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use.”

Statute of
Uses;

The effect of this statute, therefore, was to destroy its effect. the intervening estate of the feoffee to uses, and by the

^e Palgr. Counc.

^f 2 Co. Inst. 553; Hale's Juris. of the House of Lords, 46.

CHAP. VI. instantaneous transmission of the estate from him to the *cestui que use*, to create in the latter a legal instead of an equitable ownership. It *executes* the use, *i. e.* it conveys the possession to the use, and transfers the use into possession. And, as religious houses could not by the former Acts take or be seised of the estate so given to them, the statute in that respect operated as a nullity; although it succeeded in taking the estate from the feoffee to uses.

Defect of
the statute.

A new and very serious difficulty however was discovered to have arisen out of the statute soon after it came into operation; and which at first the framers of it never contemplated. This statute, which transfers the use into possession, speaks of *one* use only, and not a *succession* of uses; as therefore the judges, in those times of subtle disquisition, held that there could not be a use upon a use, it followed that where a feoffment was made to A. and his heirs, to the *use* of B. and his heirs, to the *use* of or in trust for C. and his heirs, this last use was a mere nullity,[§] because the statute executes the *first* use only, and speaks not of a second one; therefore the estate being instantaneously conveyed from A., the first feoffee (whose seisin is but momentary), to B., by virtue of the statute, B. becomes complete legal owner of the estate, of which he cannot be divested, however contrary to the original intention of the parties. It was now that a court of equity interfered to prevent so manifest a grievance, which the statute itself could not remedy. This was not by absolutely divesting the estate from B., of which he became seised under the statute; but by compelling him, as in conscience bound, to hold the estate in *trust* for C. and his heirs, in the same manner as he would have done as feoffee to uses before the statute; for as the terms of the statute were satisfied by executing the use in B., and

§ Bl. b. ii. 336; Madd.

the statute becoming thus, as it were, *functum officio*, the Court of Chancery was at liberty to exercise its jurisdiction by constituting him a trustee for the purpose of carrying into effect the manifest intention of the parties. Thus was the old doctrine of uses, that existed before the passing of the statute, afterwards revived under the denomination of *trusts*. CHAP. VI.

A change so extensive in the law of real property as the one created by the Statute of Uses, was of course subjected to much doubt and comment by our earlier lawyers, who felt and confessed themselves unable to trace its consequences throughout all its various modes of application. Thus, Lord Bacon calls it “a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort that it is hard to say which bark will sink and which will get to the haven; that is to say, what assurances will stand good, and what will not, whether is this any lack or default in the pilots, their grave and learned judges?”^h Doubts formerly entertained as to its effects.

Lord Hardwicke has classed the different interests in land into three kinds, namely:—1. The estate in the land itself, the ancient common-law fee. 2. The use, which was originally a creature of equity; but since the Statute of Uses it draws the estate in lands to it, so that they are joined, and make one legal estate. 3. The trust, which the common law takes no notice of, but which carries the beneficial interests and profits into this court, and is still *a creature of equity*, as the use was before the statute.ⁱ Different interests in land.

From this classification it will be seen that *uses* under the statute are subject to the jurisdiction of a court of common law, and *trusts* to that of the courts of equity; and originally the words *use* and *trust* were synonymously Use and trust, synonymously used.

^h Law Tracts, 299.

ⁱ Willett v. Sandford, 1 Ves. 186.

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used, and are both mentioned in the statute. But as the provisions of the statute were not deemed co-extensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction.^j In other words, the Court of Chancery, by its writs of subpœna, obliged the feoffee to appear in court and disclose his trust, and then the court compelled him to execute it.^k It is in this sense that uses before the statutes are said to be similar to trusts in a Court of Chancery, of which the common law takes no notice; “for at law,” said Lord Hardwicke, in the case of *Bagshaw v. Spencer*,^l “before the statute, every use was a trust.”

Conscience,
legally
considered.

The word *conscience*, as denoting a rule of judicial conduct, is also of clerical invention, and was by it made applicable, as far as circumstances would admit, to those or similar cases which in the Civil Law were regulated upon the principle of the *bona fides* adopted by the prætors, embracing all these obligation, which arose from certain parties being so situated that gave the one a right to expect from the other the exercise of good faith. Hence very early the doctrine of uses was referred to the obligations of conscience after uses had become cognizable in our courts of law. “Uses are created by the common law, and are relievable by conscience.”^m

Modern
trust, some-
what similar
to the
ancient use.

Trusts being therefore the offspring of equity, and unknown to the common law, it follows that they are governed by equitable rules, and have no necessary dependence for their operation upon the principles which regulate the decisions at common law, which never took cognizance of matters lying solely *in foro conscientiaë*. They are, as we have observed, what *uses* were before the

^j 2 W. Bl. 136.

^k 3 Reeves' Hist. 192.

^l 2 Atk. 574.

^m Spence, Eq. Juris. 411, *n.* (e).

statute; after the statute uses became legal estates, the object of the statute being to destroy their fiduciary character, which however the Court of Chancery revived, under the denomination of *trusts*, the *trustee* standing in the situation of the ancient *feoffee to uses*, and the *cestui que trust*, for whose benefit the trustee is vested with the estate, taking place of the *cestui que use*.

A *trust* may be thus defined: a confidence reposed in another in such a manner as gives a right in the *cestui que trust* to receive the profits, and to dispose of the lands in equity.ⁿ

Definition of trust.

Trusts are either *express*, namely, such as are created by deed or will, or *implied*; which term comprehends all such as are not express, but which arise by implication of law or the acts of the parties.

Express trusts, or those created by *deed*, are generally, *Express*.
1. Trusts created in marriage settlements. 2. In conveyances to purchasers. 3. In conveyances by way of mortgage or otherwise, for the payment of debts. 4. In assignments of *choses in action*.^o

Express trusts, created by *will*, relate to those testamentary dispositions only, where the construction of the words of a will is different in equity from that which the same words would receive in a court of law; as where the trust created by will is merely *executory* and not *executed*, to which allusion has before been made under the title of "Mistake."

Implied trusts relate to the administration of assets *Implied*. and the payments of legacies; for if the executors and administrators be not *expressly* trustees for this purpose as well as for the other duties which devolve upon them in their office, they are so by implication in a court of equity; and the whole jurisdiction of the court in the administration of assets is based upon the principle that

ⁿ 1 Madd. 17.

^o Ibid. 460.

CHAP. VI. it is the duty of the court *to enforce the execution of trusts.*^p

Executor;
when re-
garded as
trustee.

Where a legacy is charged on the real estate of a deceased person, it amounts to a declaration by the testator that his executor shall stand as a trustee for the legatees in respect to that legacy; and as such a devise vests nothing in the devisee until the executor gives his assent, it is for this reason only that a bill can be sustained in equity by him against the executor for his legacy.^q

Executor's
right, for-
merly, to
undispose of
residue;

Formerly, by the common law, the executor took for his own benefit all the personal property that remained undisposed of by the will, after paying thereout the funeral expenses and debts of the testator. But where, upon the face of the will, the courts of equity have seen sufficient to convince them that the testator did not intend the executor to take the surplus beneficially, as when he was expressly called an executor in trust, or when it appeared by any expression the office only to have been intended thereby, and not the beneficial interest, they have converted the executors into *trustees* for those persons on whom the law would cast the surplus in case of a complete intestacy, *i. e.* the next of kin; and where there was a residuary clause, but the name of the residuary legatee was omitted to be inserted, the executor could take no benefit thereby; also, where the testator has in a former part of his will given the executor a pecuniary legacy, this was presumed to afford sufficient reason for excluding him from the residue; for as the legacy itself comes out of the residuary fund, it was absurd to suppose that the testator would give expressly a *part* of that fund to a person he intended should take the whole.^r And the reason why the Court of Chancery

^p 1 Madd. 578.

^q Wind v. Jekyle, 1 P. Wms. 575.

^r Farrington v. Knightley, *ibid.* 549, *n.*

must be resorted to for compelling the distribution of the undisposed surplus of a testator's estate is, because the spiritual courts cannot enforce the execution of a trust.^s But the 1 Will. IV. c. 40, has altered the common law in favour of the executor as to the undisposed-of residue; for by section 1, it enacts that where no disposition is made of the residue, the executor shall be deemed by the court of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto, that the person so appointed executor was intended to take such residue beneficially. But the Act is not intended to prejudice any right to which the executor, if the Act had not been passed, would have been entitled in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions in respect of any residue not expressly disposed of (sec. 2).

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altered by
stat. 1 Will.
IV. c. 40.

But though a court of equity cannot set aside a will for fraud, it can convert a person guilty of the fraud, provided he claim a benefit under the will, into a trustee (at least to the extent of such benefit) for the person injured by his fraudulent act.^t

It is a rule well established, that where a legacy given to a party is charged upon both real and personal estates or upon the realty only, and the time of payment has respect to the *legatee personally*, and not the *estate or convenience of the owner*, as where it is given to a legatee at twenty-one or marriage, or to be paid at that age or marriage, the legacy, so far as it is charged on the realty, lapses by reason of the death of the legatee before the day of payment, and the personal estate only remains

Where
legacy is
charged
upon realty
as well as
personal
estate.

^s Farrington v. Knightley, 1 P. Wms. 549.

^t 1 Fonbl. 13, §.

CHAP. VI.
 Difference
 as to the
 real estate;
 whether it
 has respect
 to the legatee
personally,
 or the con-
 venience of
 the owner.

charged.^u But where the legacy charged on the real estate has regard in its postponement to the estate itself or its owner, and not the legatee, the rule is different, and the legacy does not lapse by the death of the latter before the time of payment.^v This same doctrine was in a recent case^w fully recognized by the lord chancellor, who says that "whenever portions or legacies are made payable on an event personal to the party to be benefited, and such party die before the event happen, the portion or legacy is not to be raised out of the land; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, as on the death of a tenant for life, then it is raisable after the event, although the term out of which it is to be raised has not arisen, in consequence of the party to be benefited not being *in esse* when the event happens, as in *Emperor v. Rolfe*,^x *Cholmondeley v. Meyrick*,^y and other cases."

Marshalling
 assets;

For the sake of doing justice, if possible, to every creditor of a deceased person, the court is frequently called upon to arrange the real and personal estate by a process which is called *marshalling assets*. Thus, where a specialty creditor, whose debt is a lien upon the real assets, has exhausted any part of the personal assets in satisfying his own demand, a simple contract creditor shall stand in the place of such specialty creditor, against the real assets *pro tanto*: *i. e.* so far as the latter shall have

^u *Pawlett v. Pawlett*, 1 Vern. 321; *Duke of Chandos v. Talbot*, 2 P. Wms. 602; *Rowse v. Abingdon*, 1 Atk. 482; *Harrison v. Naylor*, 3 Bro. C. C. 108.

^v *Lowther v. Condon*, 2 Atk. 127; *Watkins v. Cheek*, 2 S. and S. 199.

^w *Evans v. Scott*, 9 Dom. Proc. Law Times, 510.

^x 1 Ves. 208.

^y 1 Eden, 77.

exhausted the personal fund in discharge of his debt; and the effect of this principle is not to prevent creditors by specialty from being paid in full, but to prevent them being paid to the prejudice of the simple contract creditors, who are, in contemplation of a court of equity, *bonâ fide* creditors, equally with those by special contract, notwithstanding their legal priority.^z CHAP. VI.

But, with regard to creditors, the question as to marshalling assets has lost its importance since the passing of the stat. 3 & 4 Will. IV. c. 104, as, by the operation of that Act, debts by simple contract have become completely available against real estates of a debtor, although it provides that specialty debts binding on the heir shall be first paid in full.^a rendered almost nugatory by the 3 & 4 Will. IV., c. 104.

In *Turner v. Newport*,^b a question arose as to the apportionment of a deficient fund between a tenant for life and persons in remainder. It appeared that part of the testatrix's estate consisted of a debt on which a dividend only was obtained many years after her death. The Court declared that the proper mode of apportioning the gross sum so recovered between the tenant for life and those entitled in remainder, was to value the debt, having regard to the amount recovered and the time of recovery, at what it was worth if the debtor's estate had been administered a year after the testator's death, and to allow the tenant for life interest at £4 per cent. on such value for that time. Apportionment of a deficient fund between a tenant for life and a remainderman.

The usual order observed in the administration of real and personal assets for the payment of debts is:— Order as to assets real and personal for payment of debts.

1. *Personal estates* not specifically bequeathed or otherwise exempted from the payment of debts.

2. *Lands expressly devised* for the payment of debts.

^z Seat. Or. 100.

^a *Vide* 5 Jarm. and Sweet, 20.

^b 9 Law Times, 213.

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3. *Descended estates*.*

4. *Lands devised to particular devisees but charged* with the payment of debts.

5. *Real estates devised*, not charged with debts.

The 1st, 3rd, and 5th of these funds are called legal assets, and are applied, in a course of administration, in the payment of debts according to their legal priorities: the 2nd and 4th are denominated equitable assets, they being applied in the payment of debts *pari passu*; and, if the creditors are paid out of the personal estate, in payment of legatees *pro tanto*. And if insufficient to pay all the creditors, each creditor abates equally.

Order observed as to priority.

The usual order observed in the payment of debts in respect to their priority is,—1. Where the creditor holds a lien on the property, or is in the character of a mortgagee; 2. Claims due to the executors or administrators, who are allowed to retain all debts due to them from the deceased against all other creditors of an equal degree; 3. Funeral expenses; 4. The expenses of obtaining the probate or letters of administration; 5. The costs incurred by the creditor instituting the suit for administering the assets of the deceased; then follow, 6. The debts which, if the assets are legal, are paid according to their legal priority thus:—(1) Debts due to the crown, by record or specialty; (2) Judgments, decrees, recognizances, and statutes; (3) Debts by special contract, as on bonds or other instruments under seal; And, lastly, debts on simple contract, as on bills or notes and verbal promises, or such as are implied by law, and of which those due to the crown are to be first satisfied, a preference being also given to servants' and labourers' wages.^c

Legal priorities.

It will thus be seen that assets are divided into legal

* It is a rule of law that every devisee of land is a purchaser. *Galton v. Hancock*, 2 Atk. 437.

^c Ayck. Ch. Prac. 360.

and equitable. The former are such as are recoverable in a court of law, and the latter are such as can only be recovered by a suit in equity. CHAP. VI.

The distinction between *legal* and *equitable* assets was no doubt one of those principles arising *à foro conscientiæ*, and first introduced and enforced by clerical judges, who regarded all debts, whatever degree of priority might be allowed them according to the rules of law, to be nevertheless equally due in conscience, and payable *pro ratâ*, according to the amount of the debt.^d Therefore, whenever recourse was had to the equitable tribunal for the sake of enforcing the payment of debts out of the fund in court, provided they were not secured by mortgage or lien, these debts, whether secured by bond or by simple contract, were payable *pari passu*, as being equally due in conscience; the assets to which recourse were thus had were called *equitable*. When, however, the suit was instituted to administer assets that could be reached by the creditors in a court of law (hence called *legal* assets), and the Court of Chancery was only had recourse to for the convenience of distribution, then the rule "*æquitas sequitur legem*" was applied, and the creditors might enjoy their rights according to their several priorities which the law gave them, as they did not apply to the Court of Chancery to establish any right in their favour, or to render any fund effectual by its own peculiar powers.^e

It has been before stated (p. 192) that a vendor has a lien upon the estate sold and conveyed by him, for the amount of purchase money remaining unpaid. In such an event it has been determined, that if any purchaser devise the estate to one person, and also gives specific pecuniary legacies to others, and the general personal

^d Woolstoncroft v. Long, 15 Car. II., 2 Freem. 175; 1 Ch. Cas. 32.

^e Spence, Eq. Juris. 584.

Legal and
equitable
assets.

Vendor's
lien on
estate sold.

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estate proves to be insufficient for paying the testator's debts, the specific legacies and real estate devised must contribute rateably in paying the purchase money or the unpaid portion thereof.^f

Possessor of trust property, with notice, a trustee.

It is a general rule in equity that every person coming into possession of trust property, with notice of the trust, is to be considered as a trustee, and therefore bound, with respect to that property, to execute the trust.^g

Although the rules of equity with regard to trusts are not essentially such as regulate the decisions of a court of law, yet in the *construction* of words whereby trusts of real or personal estates are *limited*, whether by deed or will, equity has generally followed the law in regard to the creation and limitation of legal estates.^h

The Court of Chancery has no original jurisdiction touching the validity of a will, except a trust can be raised.

The Court of Chancery has no original jurisdiction to try the validity of a will. If it be of real estates, it is property cognizable in a court of law; if it relate to personal property, it is a matter for the spiritual jurisdiction,ⁱ although where *trust* is created either by will or deed, it will be subject to the cognizance of a court of equity.^j

Kerrick v. Bransby.

The case of Kerrick v. Bransby,^k which was heard upon appeal from the Lord Chancellor's Court to the House of Lords, and by them reversed, does not bear out the reporter's marginal note, namely, "that a will cannot be set aside in equity for fraud or imposition, because, if it be of personal estate, it may be set aside in the Ecclesi-

^f *Vide* Gervis v. Gervis, 2 Jur., overruling Cornewall v. Cornewall, 12 Sim. 298.

^g Daniels v. Davison, 16 Ves. 249; Adair v. Shaw, 1 Sch. and Lefr. 262.

^h Duke of Norfolk's Case, 3 Ch. Cas. 48; Bale v. Colman, 1 P. Wms. 143.

ⁱ Ryves v. Duke of Wellington, 15 Law Journ. N. S. 461.

^j 1 Madd. 452.

^k 7 Bro. P. C. 437.

astical Court, and if it be of real estate, it may be set aside at law on the issue *devisavit vel non* ;” because an issue *devisavit vel non* is in truth determined in a court of equity. In other words, although a court of equity cannot make a decree to supersede the will, it may direct an issue *devisavit vel non* ; for the court will not determine that there is fraud in procuring a will without a trial at law.¹

“ After the issue is tried,” said Lord Abinger, in *Middleton v. Sherburne*,^m “ a court of law can do nothing ; it is still before a court of equity. It is true the House of Lords, in *Kerrick v. Bransby*, reversed the judgment and dismissed the bill, yet that reversal proceeded upon a case of merits and not of jurisdiction ;” therefore, although the court does not hold original jurisdiction to set aside a will, either of real or personal estate, or to establish a will, it does, where it becomes necessary from the circumstances of the case that its jurisdiction shall be executed, proceed to investigate whether the will was properly made or not, though it will not decree against it, generally speaking, without an issue *devisavit vel non* ; and the court will either make an order for the delivery up of the will to be cancelled, or will grant a perpetual injunction against the party claiming under it, or *vice versâ*. The court thus exercises an *incidental* jurisdiction when the party has no other remedy but making an application to a court of equity, when it will direct an issue to be tried for the information of its conscience, upon motion, before it makes a final decree.ⁿ “ In making these preliminary inquiries,” said the lord chief baron, “ it may do so either by an issue *devisavit vel non*, or by directing an action of ejectment to be brought : but in many cases the best

Middleton v. Sherburne.

¹ 2 Atk. 424.

^m 4 You. and Coll. Eq. Ex. Ca. 378.

ⁿ *Middleton v. Sherburne*, *ibid.*

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and most proper remedy is an issue, because, when an action of ejectment takes place and a recovery is had at law, what is then to be done? An action of ejectment will try *toties quoties*: it is no bar at law; therefore a court of equity must do something. That very often is more conveniently done by directing an issue; for this reason, that in directing an *issue* the court has jurisdiction over the whole case, and it may grant a new trial or not at pleasure; but, in an ejectment, a new trial cannot be granted except by a court of law: therefore the court of equity to a certain extent parts with its power, and gives it to another tribunal; whereas equity may require the whole matter should be reserved for its own consideration. For example, suppose the lord chancellor should be perfectly satisfied that the will was void and ought to be set aside, and he directs an ejectment, the evidence might be still unsatisfactory to him, and the trial at law might be very unsatisfactory, but he cannot grant a new trial. It is therefore in many cases more convenient that an issue should be directed *devisavit vel non*."

Right of the court to construe a will.

Although a document relating to personal property has been admitted to probate in the spiritual courts, and the court of equity is therefore bound to receive it as a testamentary paper, yet, having done so, this court takes upon itself to construe it; and therefore, in a certain case, under the circumstances, the court refused it to operate as a codicil in equity, and dismissed a bill filed for the purpose of claiming legacies under it.^o

Reasons which brought the fraudulent obtaining a will into the Court of Chancery.

It may here be remarked that, of the numerous cases of fraud which, although remediable at common law, were by general consent brought into a court of equity, fraud in obtaining a will was for a considerable time the only exception. This instance of fraud was at length, for the same reasons which operated to gain the preference to

^o Gawler v. Standerwick, 2 Cox, 15.

this jurisdiction in other cases of fraud, namely, a more effectual remedy in examining the defendant himself upon oath, made cognizable in this court also.^p CHAP. VI.

Previous to the passing of the stat. 3 & 4 Will. IV., commonly called the Dower Act, a widow was not dowable out of a *trust* estate. One of the effects of that statute, however, was to give her the same right out of a trust estate as she has out of a legal estate: and the *cestui que* trust has the like power over the trust estate as the owner of a legal estate possesses; for the trustee possesses no power whatever over the trust estate but what is connected with the benefit of the *cestui que* trust. Widow dowable out of a trust estate, by stat. 3 & 4 Will. IV.

It is a rule of equity that where a trust is once created it shall never fail for want of a trustee; therefore if there be a devise of *real* estate in *trust*, but no person named who shall act as trustee, the court will constitute the *heir-at-law* a trustee: and in the case of a bequest of *personalty*, it will consider the *personal representative* as a trustee;^q and where trustees disclaim or refuse to act, the execution of the trust will devolve on the court. Trust will not fail for want of a trustee.

If a trustee, having been appointed, is unwilling to act, he should, previously to engaging in the trusteeship, execute a deed of disclaimer, otherwise, if he, upon being appointed by deed, accepts the trust, but afterwards refuses to act, the *cestui que* trust may compel such trustee, by a bill filed in equity against him, to perform the duties incident to that character; for having once acted in the trust, he cannot afterwards discharge himself from its obligations.^r Unwilling trustee.

It may be further observed that, whenever the legal and equitable estates unite together in the same person, the equitable estate will merge in that of the legal, and Merger of equitable into the legal estate.

^p 2 Freem. 34; Prac. Ch. 5; 2 Freem. 137; 1 Cox, 414.

^q White v. White, 1 Bro. C. C. 12.

^r Lewin on Trusts, c. 15 and 27.

CHAP. VI. will no longer be subject to a court of equity ; for a man cannot be trustee for himself. This doctrine, however, must not be understood without some restriction ; it holds only where the legal and equitable estates are co-extensive and commensurate, and not where a person has the whole legal estate and only a partial equitable interest.^s

Trustees
accountable
for breach
of trust.

Trustees will be held accountable to their *cestui que* trust for any breach of trust arising from negligence, malfeasance, or gross misapplication of the trust property ; the court will also charge the representatives of trustees with the consequences of an abuse of trust, although they may have derived no benefit from it, and notwithstanding they had paid all his debts, of which they had any knowledge, out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust or of any claim in respect of it ;^t but where there has been no *mala fides* on the part of the trustee, the court will not deal severely with him upon slight grounds, and will therefore, in such a case, endeavour to discharge a trustee from any mischief that may arise from a misapplication of the trust money.^{u*}

Executor
discharged
upon pass-
ing his
accounts.

Where an executor passes his accounts in the Court of Chancery, he is discharged from further liability, and the creditor is left to his remedy against the legatees ; but if he pay away the residue without passing his accounts in court, he does it at his own risk.^v

^s Bridges *v.* Bridges, 3 Ves. 125 ; Lewin on Trusts, 18 ; 6 Cruise's Dig. t. 39, s. 57 and 60, 4th ed.

^t Knatchbull *v.* Fearnhead, 3 My. and Cr. 122 ; see Wedderburn *v.* Wedderburn, 2 Keen 749 ; S. C. on appeal, 4 My. and Cr. 52.

^u Trafford *v.* Boehm, 3 Atk. 444.

* See now 20 & 21 Vict. c. 54, "An Act to make better provision for the punishment of frauds committed by Trustees, Bankers, and other persons intrusted with property."

^v Knatchbull *v.* Fearnhead, 3 My. and Cr. 126.

Also, if an executor retain assets in his hands, and apply them for his own purposes, he will be held to pay interest thereon at four per cent.^w CHAP. VI.

It was stated by Lord Mansfield, in a certain case,^x that the Statute of Limitations does not destroy a debt, but only takes away the remedy; therefore, where a testator by his will devises his real and personal estates charged with the payment of his debts, such a declaration was, upon the principles of equity, considered to have the effect of reviving a debt barred by the statute previous to the commencement of the suit,^y though it would not have that result where the statute had fully operated against the debt before the testator's decease.^z And in the case of *Hughes v. Wynne*,^a it was held that, when a testator has created a trust fund out of *real* estates for the payment of debts, the Statute of Limitations ceases to run, from the death of the testator, upon the principle that, "it is not to be inferred that a man has no debt, because he does not go to law to enforce payment, when he has a trustee to pay him." But it has been lately decided in the House of Lords, in *Scott v. Jones*, upon appeal, that a debt, although not barred at the time of the testator's decease, may nevertheless become so afterwards, as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate.^b This case reversed that of *Jones v. Scott*, cited in the margin, and was followed by Lord Cottenham in *Freak v. Cranfeldt*.^c

Whether a will revives a debt barred by the statute of limitations.

The case of *Jones v. Scott* came first before Sir John

^w *Hall v. Hallett*, 1 Cox, 134.

^x *Quantock v. England*, 5 Burr. 2628; 2 Bl. Rep. S. C.; *vide* also *Courtney v. Williams*, 6 Law Times, 518.

^y *Stackhouse v. Barnston*, 10 Ves. 453; *Jones v. Scott*, 1 Russ. and My. 255.

^z *Burke v. Jones*, 2 V. and B. 275. ^a 1 Turn. and Rus. 307.

^b 4 Cla. and Fin. 4, 382. ^c 3 My. and Cr. 499.

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Jones v.
Scott, in the
Rolls.

Leech, M. R., upon the question, whether a trust for the payment of debts, in a will of personal estate, would prevent the operation of the Statute of Limitations. His Honour decided that the trust, being to pay debts out of *personalty*, would not exclude the statute, the law not permitting a testator to create a special trust of his personal estate to withdraw his personalty from the administration of his executors; and the debt being claimed against the executors, and not under the trust, is not protected from the operation of the statute.

Reversed in
the lord
chancellor's
court, but
re-establish-
ed in the
House of
Lords.

Lord Brougham reversed this decision on the ground of the testator's intention; and that it was therefore of no importance whether the debts were charged upon freehold or upon leasehold estates. But this decision was again reversed in the House of Lords, as noticed above; Lord Lyndhurst holding that the executors, being in point of law the trustees for the creditors, there was nothing added to their liability from the mere circumstance of the testator himself declaring in express terms that the personal estate should be subject to the payment of his debts, and therefore such a trust could not be considered an answer to the statute.

Trustee
using trust
property
bound to
account for
all profits,
but liable for
all losses.

Where the trustee makes use of the trust property on his own account, the *cestui que* trust may compel him to refund the same with interest, or account to him for whatever profits he may have made. But should the speculations of the trustee turn out unfortunate, he is still liable to the *cestui que* trust for interest on the trust fund.^d So, if a trustee invests the trust money in a fund which the court does not adopt, and there happen to be a fall in the stocks, he must make good the deficiency;^e if, on the contrary, there arise any profit, it belongs to the *cestui que* trust; and it has been determined, upon

^d 3 Bro. C. C. 198; Massey v. Davis, 2 Ves. jun. 320.

^e Phayre v. Perce, House of Lords, 3 Dow. 128.

the same principle, that if a trustee mix trust funds with his private moneys, and employs them both in an advantage of his own, the *cestui que* trust may, if he think fit, insist upon having a proportionate share of the profits instead of interest on the amount of the trust fund so employed.^f

A testator directed his executors to lay out the residue of his estate in the purchase of land, or upon heritable or personal security, at *such rate of interest* as they should think reasonable. The executors lent the fund to one of themselves upon bond at four per cent., at a time when five per cent. might have been made by heritable or government security. Although it was admitted that the discretion given to the executors by the testator might have been soundly exercised by their lending the money to any other person, upon such terms as they thought reasonable, and that they really did imagine they were going as near as possible to the testator's intention when they did thus lend the money, the court held *that, whenever a trustee contracts with himself he cannot spare himself*; and there was no one more sacred rule of a court of equity, than that a trustee cannot so execute a trust as to have the least benefit from it himself, and therefore compelled the borrowing executor to pay interest at the rate of five per cent. for the money in his hands.^g But the trustee may relieve himself from all liability by laying out the trust money in the Reduced Bank Annuities, or Three per Cent. Consols, which is the fund the court adopts.^h A trustee should, therefore, for his own security, endeavour to adhere to the tenor of his trust as closely as possible; for, as the office of a trustee, as well as an executor or administrator, is considered honorary,

Trustee or
executor
contracting
with himself
cannot spare
himself.

^f *Docker v. Somes*, 2 My. and K.

^g *Forbes v. Ross*, 2 Cox, 133.

^h *Holland v. Hughes*, 16 Ves. 111.

CHAP. VI. they are allowed no remuneration for care and trouble, unless it be especially provided for in the deed or will creating the trust: and it has been determined that an executor will receive no allowance for his management, time, and labour, expended in carrying on a business after a testator's death;ⁱ but persons holding the situation of trustees will be allowed all fair and honest expenses incurred in executing the purposes of the trust.^j The court will, for the sake of the public, extend its full protection to trustees in the exercise of every reasonable precaution, and requiring full proof of the title of parties urging their claims under the trust. But if, after having received full evidence of such title, a trustee shall perseveringly persist in withholding the fund from the party to whom it really belongs, upon grounds which wholly fail, and especially where a part of those grounds is a claim in which that trustee is himself interested, the court will not, upon the same rules, allow the trustee so to conduct himself, without paying the costs of such a mode of proceeding.^k

Stat. 11 Geo.
IV. and 1
Will. IV.
c. 60, as to
lunatic
trustees.

By the 11 Geo. IV. and 1 Will. IV. c. 60, where any person seised or possessed of lands upon trust or mortgage shall be lunatic, the committee of such person's estate may, by the lord chancellor, convey such land, in the place of such trustee or mortgagee, to such person and in such manner as the lord chancellor shall think proper (sec. 3). Also, where stock is standing in the name of any lunatic trustee, or executor, the lord chancellor is empowered to direct the committee of the estate of any such lunatic to transfer, or join in transferring, such stock to, or into the name of, such person, and to receive and pay over, or join in receiving and paying over, the dividends of such stock, in such manner as the lord chancellor shall

ⁱ *Burden v. Burden*, 160; *Ves.* 170.

^j *Burge v. Brutton*, 2 *Hare*, 373.

^k *Froste v. Hamilton*, V. C. Knt. Bruce's Court, May 3, 1842.

direct; all which shall be as effectual as if the lunatic had been of sane mind, and had transferred, received, and paid such stock or dividend (sec. 4).

By the same Act it is provided that, where a person, Lunatic, not found so by inquisition. being lunatic, shall not be found so by inquisition, the party appointed by the lord chancellor in the place of such lunatic may, by the direction of the lord chancellor, convey or join in conveying, or transfer or join in transferring such stock, and receive and pay over the dividends thereof as heretofore mentioned, provided such sum of money shall not exceed £700 (sec. 5).

By section 8 of 11 Geo. and 1 Will. IV. c. 60, it is enacted that, where any person seised of land upon any trust shall be out of the jurisdiction or not amenable to the process of the court, or it shall be uncertain, where there are several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid be living or dead, or if known to be dead, it shall not be known who is the heir, or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by any agent duly authorized by, any person entitled to require the same, it shall be lawful for the court to appoint a person to convey; and such conveyance is to be as effectual as if executed by the trustee or his heir. A similar provision is also made with regard to trustees of leasehold estates who are out of the jurisdiction: also, in the case of persons in whose names, as trustees or executors, any stock shall be standing, being out of the jurisdiction or not amenable to the process of the court (sec. 9 and 10). And all application to the Court of Chancery under the authority of the above Act must be made by petition (sec. 11).

CHAP. VI.

That the student may not be perplexed at the different Acts of Parliament, each one referring to and bearing the name of the Trustee Act, it may be necessary to state that the Acts relating to trustees are of two kinds, but neither of them have any necessary connection with the other. One is called the "*Trustee Relief Act*," and the other the "*Trustee Act*," and—

First, the 10 & 11 Vict. c. 96 (22nd July, 1847), amended by 12 & 13 Vict. c. 74 (28th July, 1849); the corresponding Act for Ireland being the 11 & 12 Vict. c. 28 (31st August, 1848).

These are called the TRUSTEE RELIEF ACTS. The great facilities now afforded to trustees for relieving themselves from their responsibilities will frequently be an inducement for them to take advantage of the provisions contained in the above-mentioned Acts, whenever they are in doubt as to the extent of their duties, either arising from the state of the property with which they are invested in their fiduciary character, or the dubious and conflicting interests of those claiming the benefit of the trust; and this without rendering it imperative upon them, should they think fit to proceed by a regular suit or otherwise. It simply consists in lodging the fund in the Court of Chancery, and thus doing, relieve themselves of all further responsibility, wash their hands of the trust, and leave the several claimants to settle their disputes with the Court as they best may, in respect to the fund itself, which now becomes subject to the administration of the court. The Act provides that all trustees, executors, administrators, or other persons having in their hands any money belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit (*vide* 41 Cons. Or. r. 1 (1) *et seq.*), shortly describing the instrument creating the trust according to the best of their knowledge and belief, to pay the same with the

privity of the Accountant-General of the High Court of Chancery in the matter of the particular trust (describing them as accurately as may be), in trust to attend the orders of the court; and further, that annuities or stocks in any Government or Parliamentary securities, or of the East India or South Sea Companies, may also in like manner be transferred in the name of the Accountant-General, in trust to attend the orders of the court, and that the receipt of one of the cashiers of the bank, or the certificate of the proper officer of such transfer or deposit, shall be a sufficient discharge to the trustees for the money or securities so lodged or transferred.

The 12 & 13 Vict. c. 74, "An Act for the further relief of Trustees," merely supplies an omission in the former Act, by providing that if on any petition presented in the matter of that Act, it shall appear to the judge of the Court of Chancery before whom such petition shall be heard, that any money, annuities, stocks, or securities are vested in any persons as trustees, executors, etc., or otherwise upon trusts within the meaning of the Act, and that the *major part of such persons* are desirous of lodging them, but that for any reason the concurrence of the other or others of them cannot be had, the courts may order the lodgment to be made by the major part of such persons without the concurrence of the other or others of them; and every lodgment so made is to be as valid and effectual as if the same had been made on the authority or by the act of *all* the persons entitled to such moneys, annuities, etc.

Under these last-named Acts were issued the Orders of the Court of Chancery in England, June 10, 1848, and Order of the Court of Chancery in Ireland, October 9, 1848.

There are also the Orders, 12th November, 1856, by which applications, under the "Trustee Relief Acts,"

CHAP. VI. — where the trust fund does not exceed the sum of £300 in cash or £300 stock, are to be made at chambers.

Secondly, THE TRUSTEE ACT, 13 & 14 Vict. c. 60 (5th August, 1850), abolishes 11 Geo. IV. and 1 Will. IV. c. 60, the 4 & 5 Will. IV. c. 23 and 1 & 2 Vict. c. 69. Its object was "to consolidate and amend the laws relating to the conveyance and transfer of real and personal property vested in mortgagees and trustees." "The first object of the Act," says Mr. Headlam in his introduction, "is to extend the subject-matter to which the summary jurisdiction of chancery may be applied, and the next to increase the number of contingencies upon which these summary powers may be exercised." The former Acts did not embrace funds belonging to Joint Stock Companies, so as to empower the court, by petition or otherwise, to vest the property in persons beneficially entitled whenever a trustee of the shares becomes lunatic or incapable of acting in the trust. Under the Act also provision is made in respect to contingent rights in lands and *choses in action* as to personalty.

Another object of the Act was to diminish in a great degree the expense and delay incident to proceedings under the former practice, wherein upon a petition filed for the appointment of a new trustee or trustees, a reference was directed to the master to approve of a fit and proper person so to act, and upon the matter coming again before the court upon the master's report, to confirm such report; a conveyance was afterwards necessary to vest the estate in the newly appointed trustee; all which proceedings were the occasion of much procrastination and expense, and this to accomplish a simple purpose. But under sections 24 and 25 of the Act, the court is empowered at once, upon the appointment of new trustees, to make an order vesting both the real and personal estate subject to the trust, without any transfer or

conveyance, in such trustees, and thus by the same order appointing the trustees, or by any subsequent order (sec. 34 and 35). This provision, it will be seen, has the same effect with regard to the immediately vesting estates in trustees as the appointment of assignees under a bankruptcy has in vesting the property of the bankrupt in them. A new practice was also introduced by section 38, namely, that of enabling a party to go at once before a master with a statement of the facts upon which he sought the order, and the master might or might not, at his discretion, certify that such order was proper, which order could however only be made by one of the judges of the Court of Chancery or the lord chancellor in his jurisdiction in lunacy.

This was followed by the "TRUSTEE ACT EXTENSION," 15 & 16 Vict. c. 55 (30th June, 1852), which in section 2 repeals the 17th and 18th sections of the 13 & 14 Vict. c. 60. "But," says the learned author last alluded to, "as this Act is intended to be confined to estates held upon trust or mortgage, it does not repeal the statute 11 Geo. IV. and 1 Will. IV. c. 65, which gives the Court of Chancery and the lord chancellor power over estates in which lunatics and other persons under legal disabilities are beneficially interested. Neither does it repeal the 1 Will. IV. c. 47, the Act for the payment of debts out of real estates, nor the 2 & 3 Vict. c. 60, or the 11 & 12 Vict. c. 87, consolidating and amending 1 Will. IV. c. 47, because, although this Act gives a simpler process for several of the objects provided for by those statutes, yet there seems no substantial objection to an option being left of proceeding either under this Act or under those statutes. Moreover the repeal and re-enactment of several of the clauses contained in those statutes would have materially increased the length of this Act."

By Orders, 12th November, 1856, applications under

CHAP. VI. the "Trustee Acts," where any order or decree has been pronounced by the court for the sale or conveyance of lands, are to be made at chambers.

By these Orders and 35 Cons. Or. r. 1, art. 4 and 5, applications on behalf of infants under the 12th, 16th, and 17th sections of the 1 Will. IV. c. 65, are also to be made at chambers.

Also, under the 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74, in all cases where the trust fund does not exceed £300 cash or £300 stock (35 Cons. Or. r. 1, art. 3).*

Execution
creditor
made trustee.

If the creditor of a trustee take the property or goods which form the subject of trust into execution, the court will convert such creditor himself into a trustee.¹

Difference
as to liability of
executors and
trustees.

There is a difference between the amount of liability of executors and trustees in respect of their joint receipts; for it has been said that, if two executors join in giving a discharge for money, they are both accountable, though only one actually received it.^m But if two trustees join in a receipt or conveyance, and one receive the money, only the receiving trustee shall be charged, because the other joined purely for the sake of conformity;ⁿ whereas, in the case of executors, as one executor alone might give a discharge, the joining of the other is an unnecessary act, with which he might refuse to comply. This distinction seems to be based upon the different powers and interests which trustees and executors are invested with in their respective estates. Thus executors have a joint and several interest, whilst trustees have only a joint interest and authority, and must therefore all join in conveying and also in giving receipts. Indeed, Lord Har-

* See *Re Bloomar* (a lunatic), 30 L. T. 239. Trustee Act of 1850. The Lunatic Regul. Act of 1853.

Foley v. Burnell and Anr. 1 Bro. C. C. 274.

^m *Ex parte Belcher*; *Ex parte Parson*, Amb. 219.

ⁿ *Fellows v. Mitchell*, 1 P. Wms. 81.

court, C., held that two executors joining in a receipt, and one only receiving the money, they are both liable in the case of a creditor, but not to legatees;^o but Lord Thurlow, in adverting to the last-mentioned case, says, "The distinction that a creditor shall have a right to charge an executor, and a legatee not, seemed to him to be an odd one;^p that in a late case,^q the rule is confirmed that trustees shall not be chargeable, but executors shall." His Lordship then proceeded to state that the only case to the contrary was the one of *Westley v. Clarke and Betts*, in which there were peculiar circumstances, but that he much questioned the decision.

The circumstances of this case, as stated in a foot-note to *Fellows v. Mitchell and Owen*, were the following:—*Fellows v. Mitchell.*
M. Smith, by his will, gave the two plaintiffs legacies of £300 and £100, and the residue of his personal estate to his widow, and appointed Clarke, Betts, and Thompson his executors, with a clause that one of his executors should not be answerable for the acts of the others. The testator died on the 22nd of June, 1755. Part of his estate, to the amount of £600, was at the time of his death out on mortgage. Thompson, who was an attorney, after the testator's death, called in the mortgage and *received the money*, and *afterwards* sent his clerk with the assignment of the mortgage to his two co-executors, who executed the same, and signed the receipt indorsed thereon. Thompson became a bankrupt on the 27th day of July, 1756, without having accounted for the money; and the plaintiffs, the legatees, filed their bill to charge Clarke and Betts with this money received by Thompson.

On the hearing the cause, Lord Northington thus alluded to the doctrine which had then obtained in the

^o *Churchill v. Lady Hobson*, *ibid.* 242.

^p *Sadler v. Hobbs*, 2 Bro. 116.

^q *Leigh v. Barry*, 3 Atk. 584.

CHAP. VI. court: "This claim is founded on the notion of a general rule having been established in this court, that where executors join in a receipt, they themselves are all liable *in solido*, because their joining is unnecessary: and that a different rule has been established with respect to trustees who join in receipts, namely, that they are not answerable *in solido*, but in proportion only to what they receive."

Practice of
the court
in more
modern
times as to
liability of
trustees.

The courts have, in more modern times, inclined to moderate the rule in certain cases, where one executor has joined with his co-executors in giving a receipt, and have held that, if he can prove that he was not present when the money was paid, and that he never had any control over it, he shall not be liable for the loss.^r But after the judgment of Lord Cottenham, in the case of *Knatchbull v. Fearnhead*,^s already referred to, executors would be but ill-advised to tamper with the rules relating to their responsibilities, under any circumstances whatever.

Before the passing of the 22 & 23 Vict. c. 35 (Lord St. Leonard's "Act to amend the law of property and to relieve trustees"), purchasers from trustees for sale, unless they were exonerated by the instrument empowering the trustees to sell, were generally liable to see to the application of the purchase money; but the 23rd section of the Act provides that the receipt of such trustees shall discharge a *bond fide* purchaser from liability, although there be no such clause in the deed creating the trust, unless the contrary shall be expressly declared by such deed.

By the 32nd section, when a trustee, executor, or administrator shall not, by some instruments creating his

^r *Brice v. Stokes*, 11 Ves. 324; *Wms. Exec.* 1125-7; *Matt. Exec.* 313, 2nd ed.

^s 3 My. and Cr.

trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper. But as doubts had been raised as to whether this section was retrospective,^t it was declared by section 23 & 24 Vict. c. 38, s. 12, that the 32nd section in the before-mentioned Act shall have a retrospective operation.

When, from circumstances, it is deemed fit to remove a trustee, the proper course is either to file a bill in equity for that purpose; or it may be done, and a new trustee appointed, by means of a petition presented at the Rolls Court, where the old trustee concurs in or consents to be removed from the trusts, and the trust fund exceeds £300 in cash, or £300 stock. Should however the amount of cash or stock not be more than £300 respectively, then, by an order of court, 12th of November, 1856, application must be made before the master of the rolls or the vice-chancellor respectively, while sitting at chambers. This application is made under the 10 & 11 Vict. c. 96, "The Trustee Relief Act," and the 12 & 13 Vict., "An Act for further relief of trustees."

Removal of
trustee.

^t Jur. N. S. 1236; 8 Week. Rep. 55.

PART III.

CHAPTER I.

BY AND AGAINST WHOM A SUIT MAY BE INSTITUTED.

Solicitor to
take a spe-
cial autho-
rity from his
client before
suit.

BEFORE commencing proceedings in a court of chancery, the solicitor should be careful to obtain a special authority from his client to institute the suit; and although such authority may be by *parol*,^a yet, according to the strict rules of practice, there ought to be a warrant in *writing* for that purpose: if such precaution be dispensed with, it is at the peril of the solicitor;^b for should the authority be afterwards disputed by the client, the *onus probandi* will lie on the solicitor. In the case of *Wright v. Castle*,^c Lord Eldon stated that there must be a special authority to institute, although a general authority is sufficient to enable the solicitor to defend a suit. "It is settled," said his Lordship, "that if the plaintiff denies, and the solicitor asserts, authority to have been given, and there is nothing but assertion against assertion, the court will say that the solicitor ought to have secured himself by having an authority in writing, and that, not

^a Lord *v. Kellett*, 2 My. and K. 1.

^b *Tabbernor v. Tabbernor*, 2 K. 680.

^c 3 Meriv. 12.

having done so, he must abide the consequences of his neglect."

And it has even been decided that, if where a solicitor relies upon a written retainer as an authority for instituting a suit in this court, the retainer ought explicitly and clearly to state such object, otherwise the bill must be taken off the file on the same terms as in *Allen v. Bone*,^d viz. to have the bill dismissed, with costs, as between solicitor and client, to be paid by the solicitor, and the like costs as to the motion to dismiss.^e

The first process, on behalf of a subject merely, in a court of chancery, is by preferring a bill in the nature of a *petition* or complaint. It is addressed to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, as the case may be: should the person who holds the seal be a party, or the seal happen to be in the Queen's hands, the bill is addressed to the Queen herself in her Court of Chancery.

Suits on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as objects of a public charity, are instituted by the attorney or solicitor-general.^f By virtue of the 16 & 17 Vict. c. 137, called the Charitable Trust Act, the Court of Chancery has power to grant relief in cases relating to any charity, without any information, bill, or petition, upon application to a judge at chambers; but it is not to affect any proceeding wherein any person shall claim any property or seek relief adversely to any charity (sec. 57). And where there are conflicting claims between the sovereign and persons partaking of his or her prerogative, or under his or her peculiar protection, the crown, as plaintiff, may be represented by the attorney-general,

^d 4 Beav. 408.

^e *Atkinson v. Abbott*, 25 L. T. 314.

^f Mitf. Tr. Pl.

CHAP. I.

and, as defendant, by the solicitor-general.^g The bill exhibited by the attorney or solicitor-general, as they merely exercise their office officially, is not by way of petition, but of *information* to the court respecting the rights of the crown, which it claims for itself, or those who are under its immediate protection, and the violation or detention of those rights. When the subject-matter of the information does not immediately affect the interests of the crown, as well also as in some cases concerning it, the proceedings are carried on in the name and under the direction of a relator, who is answerable for the propriety and conduct of the suit; and for this cause neither a *feme covert*, an infant, nor an idiot can be a relator. If the relator should himself have a personal interest in the matter of complaint, as well as the crown, the proceedings form together that which is denominated *Information and Bill*. In addition to the ordinary method of commencing a suit in chancery, we may just advert to the more recent practice which has been introduced by Orders, 22nd of April, 1850, in cases requiring a more summary proceeding than a common bill; and also an application under Sir G. Turner's Act, 13 & 14 Vict. c. 35, by means of a special case. But as these are confined to matters of a peculiar nature, they are not otherwise intended to supersede the ordinary mode of commencing a suit by bill; and as they will be mentioned in their proper place, we may dismiss the consideration of them for the present.

Ordinary
method of
suing, in re-
lation to
parties.

Bodies politic and corporate, and all persons not partaking of the prerogative of the crown, sue either by themselves or by others: persons of full age, not being married women, idiots, or lunatics, may file a bill by themselves alone. A *feme covert*, provided she is in such a condition as to be by law considered a *feme sole*, may

Feme covert.

^g Attorney-General v. Mayor of Bristol, 3 Madd. 319; S. C., Jac. and W. 294; Attorney-General v. Vivian, 1 Russ. 226.

sue in her own name, as where her husband is banished, or has abjured the realm ; but this being an exception to the general rule, a married woman having interests in opposition to those claimed by her husband, as also an infant, must respectively sue by their *next friend* ; but idiots and lunatics exhibit their bill by the committees of their estates.^{h*} A suit on behalf of the rights of a married woman is usually instituted by herself and her husband jointly. Where however it appeared that the woman was living separate from her husband, who was not in a position to support her, and that she had no property except that which she claimed in the suit, she was allowed to sue *in formâ pauperis*, in respect of her separate estate, without the necessity of having a next friend appointed.ⁱ When a bill has been filed on behalf of an infant by his next friend, he may, on his coming of age, abandon the suit upon paying the costs ; but he cannot, unless it appear that the bill was improperly filed, compel the *prochein ami*, or next friend, to pay the costs ; and for this reason, if the infant, as soon as he comes of age, repudiates the suit, it is not necessary to apply to the court to have the bill dismissed ; but the proper course would be to apply in some summary way, in order to call upon the plaintiff's solicitor not to take any other

Idiots and lunatics by their next friend.

^h Mitf.

* By the 11 Geo. IV. and 1 Will. IV. c. 65, s. 23 and 24, it is provided, that where any person, being lunatic, shall be seised or possessed of any land, either for life or other limited interest, with a power of granting leases, such power of leasing may be executed by the committee of the estate of such person, under the direction of the lord chancellor ; and where a lunatic shall be seised of estates, in fee simple or in tail, or an absolute interest in leasehold estates, the lord chancellor may order the committee of the estate of such lunatic to make such lease of the land of such lunatic, according to his interest therein, for such term of years as the lord chancellor shall direct.

ⁱ *Re Page*, 20 L. T. 243 ; *Wellesley v. Wellesley*, 16 Sim. 1.

CHAP. I. step in the cause ; and if the solicitor proceed after such notice, the plaintiff, the late infant, may make an application to stay all proceedings in the cause.^j A suit in a court of chancery is usually denominated proceedings by *English bill*,* a term made use of formerly to distinguish it from suits within the ordinary jurisdiction of the court as a court of common law, where, as in the other courts of law, proceedings used to be, in more ancient times, since the Conquest, entered and enrolled in the French and Norman languages, and afterwards in the Latin,^k until the statute 4 Geo. II. c. 26, which finally determined that the proceedings at law should be done into English, from which period the race of black-letter lawyers began visibly to decline.

Generally,
all persons
capable of
commencing
suit may, in
like manner,
defend.

Generally speaking, all persons who are capable of commencing suits may also be made defendants under the like restrictions ; for instance, bodies politic and corporate, and persons of full age, not being idiots, lunatics, or married women, may defend a suit by themselves. As a *feme covert* usually sues jointly with her husband, so she must, where her interests are the subject of the suit, be made a defendant jointly with him ; but if she claim any interest therein in opposition to the demands of her husband, the court, upon application, will order that she may be allowed to defend the suit separately from her husband. But at law, where the cause of action would survive to the wife, she must sue jointly with her husband, although, if the cause of action should arise during the coverture, the husband sometimes brings the action in

4 Madd. 461 ; *Boschetti v. Powell*, L. Ch. C. ; 5 Law Times, 301.

* The period when proceedings in *Chancery* became distinguished as by "English Bill," was about the reign of Henry V. *Dodd v. Browning*, 1 Cal. 13.

^k 36 Ed. III. ; Bl. b. iii. c. 21.

his own name, or in the joint names of himself and wife.¹ CHAP. I.

And where the suit relates to the separate property of the wife, she and her husband are not allowed to be made co-plaintiffs; but the bill must be filed by the wife, with her next friend, and the husband in this case ought to made a defendant.^m But a bill cannot be filed in the name of a married woman without her consent.ⁿ

In case of wife's separate property, she sues by her next friend.

There is, however, an exception made in respect of an infant defendant. We have observed that he sues by his *prochein ami*, or next friend; but he defends by guardian, who is usually, though not necessarily, the nearest relative who does not claim any interest in opposition to that of the infant. If the infant reside within twenty miles of London, the guardian is appointed by the court. If he reside beyond that distance, the guardian is appointed by commission. In the case of an idiot or lunatic, the court will appoint the committee to be guardian *ad litem*, unless his interests are adverse to those of the idiot or lunatic; for in that case another person will be appointed guardian to defend the suit. If the bill do not state the defendant to be found an idiot or lunatic by inquisition, the court will require an affidavit or other evidence showing the state of mind of the defendant, before it will permit him to defend by guardian. When the crown is in possession of that which the suit seeks to divest, or where the rights claimed by the crown are the sole object of the suit, the application must be made to the king by petition of right, upon which the crown may refer it to the chancellor to do right, and direct that his attorney-general

Infants defend by guardian.

¹ Com. Dig. tit. "Baron and Feme," V. and X.; 2 Chit. Arch. 895, 7th ed.; Dunstan v. Burrell, 1 Wils. 224.

^m Sigel v. Phelps, 7 Sim. 239; Wake et Ux. v. Parker, 2 Keen, 59; Owden v. Campbell, 8 Sim. 551.

ⁿ Pennington v. Alwin, S. and S. 264.

CHAP. I. shall be made a party for that purpose: the queen is entitled to the same prerogative.

Effect of late
Municipal
Corporation
Act.

It has been stated that bodies politic and corporations may file a bill by themselves, or by others; but the late Municipal Corporation Act,^o having affixed a public trust upon and made available for public purposes that which before was mere corporate property, capable of alienation according to the uncontrolled will and pleasure of the body corporate, that Act has in a certain measure changed the form of the remedy. It was therefore held, in the case of the Attorney-General *v.* Wilson,^p “that, as corporate property is now applicable to public purposes, it may be right that, in all future instances, the attorney-general should sue in conjunction with the corporation.”

Attorney-
General *v.*
Wilson.

^o 5 & 6 Will. IV. c. 76, 997.

^p 9 Sim. 49.

CHAPTER II.

OF THE BILL.—RECEIVER.—WRIT OF NE EXEAT REGNO.

A BILL in Chancery was formerly divided into nine parts Different parts of a bill.
 —1. The address; 2. The parties; 3. The plaintiff's case or stating part; 4. The charge of confederacy; 5. The pretence and charge; 6. The part which gives jurisdiction; 7. The interrogatory part; 8. The prayer for relief; 9. The prayer for issuing process.

And whenever the plaintiff sought to obtain the special order of the court, or a provincial writ, it was necessary to insert in the bill, next before the prayer of process, a prayer for the order or particular writ which the case required,^a and the bill was generally named after the writ itself, as an injunction-bill, or a bill for a writ of *ne exeat regno*.^b But now, since by the 15 & 16 Vict. c. 86, s. 10, every bill of complaint (under which term is included also an information) to be filed in the court, as a bill in Chancery, frequently contains a prayer for a receiver, where the property in dispute may be injured from neglect, or a writ of *ne exeat regno* when the plaintiff's demand may be endangered by the defendant going abroad, it may be advisable in this place to say something on both subjects. The bill must always be drawn or settled by counsel from

^a Wood v. Beadell, 3 Sim. 273.

^b Mitf. 47.

CHAP. II. instructions furnished him by the plaintiff's solicitor. It also requires the signature of counsel previous to its being filed, who in strictness is responsible for anything scandalous or impertinent contained therein. The bill was formerly, upon being prepared, engrossed in words at full length on skins of parchment, with counsel's signature copied at the end. But by the 1st section of the 15 & 16 Vict. c. 86, the practice of engrossing on parchment bills of complaint to be filed in the court, and of filing such engrossment, shall be discontinued; and the clerk of the records and writs shall receive and file a printed bill of complaint in lieu of an engrossment, in like manner as they now receive and file such engrossment. But section 6 provides that the clerk of records and writs may receive and file a written copy of any bill of complaint, praying a writ of injunction or a writ of *ne exeat regno*, or filed for the purpose of making an infant a ward of court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days; and upon its being served on any defendant thereto, such service shall have the same effect as the service of a printed copy. Section 7 binds the plaintiff to deliver to the defendant or his solicitor upon application, such a number of printed copies of his bill of complaint as he shall have occasion for, upon being paid for them at such rate as shall be prescribed by any general order of the lord chancellor.* The above provisions, as to filing and delivering printed bills, shall be applicable to the same, as amended—sec. 8.

Receiver,
under what
circum-
stances
appointed.

When a bill is about to be filed against an executor or administrator who is committing a *devastavit*, or where there is a suit between the representatives of co-partners in trade, or if an infant be entitled to a real estate and

* By Ord. 6, 1st set, 7th August, 1852, and 9th Con. Ord. r. 5, confined to ten printed copies.

require the protection of the court, it is usual, and for the most part expedient, to apply to the court for a receiver: but, in the case of an executor, a receiver will not be appointed unless there be a manifest breach of trust by wasting the property, and this not from a single act only, but an habitual and speculative course of dealing, bringing the property into danger, in which event the court will treat the executor or administrator as a trustee;^c nor will a receiver be allowed where one of several partners survives, by reason of the confidence reposed in him.^d In the case of partnership affairs, or where an executor is wasting the assets of the testator, a receiver is sometimes allowed upon affidavit before answer;^e but usually the application is not made until the defendant has answered, and in the case even of an infant there must be a cause depending.^f A receiver is considered as an officer of the court, which, upon being satisfied of the necessity of his appointment, will make the order accordingly, upon such person giving security (Ord. 13, Oct. 16th, 1852; 24 Con. Ord. r. 1). A receiver will be appointed in most cases, even before answer, upon sufficient affidavits, when, through fraud or mismanagement, the property in dispute would be wasted or misapplied unless taken under the protection of the court.^g

A receiver is an indifferent person between the parties in the cause. He is appointed by the court for the purposes hereafter mentioned, when it does not appear reasonable that either party should be so.^h But the court will not appoint a receiver when no suit is pending, unless

^c *Middleton v. Dodswell*, 13 Ves. 268.

^d *Philips v. Atkinson*, 2 Bro. C. C. 272.

^e 13 Ves. 268; *Vann v. Barnett*, 2 Bro. C. C. 158; *Tanfield v. Irvine*, 2 Russ. 149.

^f 1 Atk. 489.

^g 2 Bro. C. C. 158.

^h *Wyatt's P. R.* 355.

CHAP. II. in the case of idiots or lunatics.ⁱ Also, if the court see fit, it will allow a receiver in an infant's suit, whether prayed for by the bill or not.^j

Difference
in the ap-
pointment.

There is a difference as to the office and authority of a receiver, whether appointed by, and acting under, the direction of the court, or whether he be appointed by deed; if by the latter, he can only act within the scope and limits prescribed by that instrument wherein his power is clearly defined. If he derive his authority as an officer of the court, he is invested with certain powers which our laws of tenures are unable to confer upon individuals.

Sureties
given by a
receiver.

Before a person can be appointed a receiver, he must enter into his recognizance with two sureties for the proper performance of his office, who, in general, will not be discharged until their principal has passed his accounts.

When the order is made directing such appointment, the security is to be allowed by the judge to whose court the cause is attached and taken before a person authorized to administer oaths in chancery, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as the judge shall appoint, and to account for and pay the same as the court shall direct or as the case may be, to be answerable for what he shall receive in respect of the personal estate, and to pay the same as the court shall direct. He is to be allowed a proper salary for his pains in receiving such rents and profits, or, as the case may be, he shall have an allowance for collecting the same (Ord. 13, Oct. 16th 1852; 24th Cons. Ord. r. 1).

The judge shall fix the days upon which the receiver is to leave and pass his accounts, and also the days upon

ⁱ Wyatt's P. R. 356.

^j Simpson v. Gutteridge, 1 Turn. C. P. 448.

which such receiver shall pay the balances appearing due on the accounts so left, or such part thereof as the chief clerk shall certify as proper to be paid by them, and in case of neglect the judge before whom the receiver is to account shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries claimed by such receivers, but also charge them with five per cent. per annum upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers (24th Cons. Or. r. 2). Upon the receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon shall be taken out, and the account when passed shall be entered by the solicitor of the receiver in books as under the former practice; when all has been done the books containing the accounts shall be deposited in the office of the clerk of the records and writs (24 Cons. Or. rs. 2, 3, and 4). And by 35 Cons. Or. r. 23, in case of such receiver making default in leaving or passing any account, or in making any payment, or in case any other proceeding pending at a judge's chambers be not prosecuted with due diligence, the parties, or any of them, may be required to attend at chambers at any time to be appointed for that purpose, to show cause why such account has not been left or passed, payment made, or other proceeding prosecuted; and thereupon such directions may be given at chambers or by adjournment in open court as shall be proper to ensure the prosecution thereof by some person interested therein, and for the discharge of such receiver and the appointment of another.

The appointment of a receiver is conclusive, unless some substantial objection be shown: and, therefore, although a practising barrister may be appointed as receiver, yet the solicitor in the cause cannot, by reason

Decision of
the court as
to a receiver.

CHAP. II. of the general rule that no person ought to control his
 Who are dis- own accounts;^k and, upon the same principle, the solici-
 qualified to tor under a commission of lunacy was not allowed to be
 be receivers, appointed receiver of the lunatic's estate, the court being
 extremely jealous of appointing any person to be receiver
 whose duty it is to call the receiver to an account;^l for
 it is a rule in equity and common sense, based upon prin-
 ciples of human nature,^m that a man shall not place himself
 in a situation wherein his private interests conflict with
 his duty: should he act in opposition to this provision,
 whatever personal advantage he thereby acquires it must
 be rigidly accounted for. The same objection prevails
 also with respect to a trustee, who, being an accountant
 party whose duty it is to check the receiver, cannot for
 that reason be appointed a receiver himself,ⁿ unless it be
 under special circumstances and without emolument; for
 example, where, taking into consideration his knowledge
 of the estate, it would be better that the trustee should
 be permitted to become the receiver, as in the case of a
 mere trustee for preserving contingent remainders, or a
 trustee with power of sale and exchange at a future pe-
 riod, and which cannot be exercised during his receiver-
 ship.^o Neither can the *prochein ami* of infant petitioners
 be allowed to act as receiver; for it is the duty of the
 next friend to exercise control over the accounts and
 conduct of the receiver, which would be inconsistent with
 his appointment to that office.^p But in two more recent
 cases,^q it has been determined that an executor and

^k Garland v. Garland, 2 Ves. jun. 137.

^l *Ex parte* Pincke, 2 Mer. 452.

^m Broughton v. White; Broughton v. Broughton, 26 L. T. 54.

ⁿ Anon., 3 Ves. 515; — v. Jolland, 8 Ves. 72.

^o Sykes v. Hastings, 11 Ves. 363; Jones v. Sutton, 15 Ves. 584.

^p Stone v. Wishart, 2 Madd. 64.

^q Marshall v. Holloway, 2 Swanst. 452; Morison v. Morison, 4 My. and Cr. 215.

trustee may be appointed consignee as receiver, with the usual profits. A first mortgagee cannot have a receiver, because, having the legal estate, he may obtain possession by ejectment;^r neither can a master in chancery, nor the receiver-general of a county, be appointed a receiver. And, lastly, as the same remedies cannot be obtained against a peer as may be had against a commoner, in that he cannot be committed for misconduct, the court will object to the appointment of a peer to be a receiver, although he consents to discharge the duties without fees.^s

A writ of *ne exeat regno* is a high prerogative writ, originally applied only to purposes of the state, and afterwards extended to private transactions in cases of equitable debt:^t as it is a remedy not in itself distinctly referable to private transactions between subject and subject, an application for the writ is to the discretionary power of the Court of Chancery acting beyond the limits of the common law.^u This writ issues to restrain a defendant from going out of the kingdom to avoid the process of the court, although it does not seem necessary that the defendant's motive should actually appear, nor that the affidavit should state that his intention for going abroad is to defeat the jurisdiction, notwithstanding Lord Eldon, in the case of *Etches v. Lance*,^v at first held differently; but it is sufficient that the plaintiff's demand is endangered thereby, and for this purpose the Isle of Man,^w Ireland, Scotland, and Jersey, are each of them deemed a foreign country.^x This process, which is usually

Writ of *ne
exeat regno*.

^r 2 Madd. Ch. Prac.

^s *Attorney-General v. Gee*, 2 Ves. and B. 208.

^t *Jackson v. Petrie*, 10 Ves. 165.

^u *De Carrière v. De Calonne*, 4 Ves. 590.

^v 7 Ves. 417.

^w *Collinson v. —*, 18 Ves. 351.

^x 1 P. W. 262; 2 Dick. 535; 2 Atk. 66.

CHAP. II. prayed for by the bill, although not necessarily so,^y can only be obtained by affidavit, swearing positively that the defendant is about quitting the kingdom, or stating some circumstance indicating such intention, whether founded upon his own declaration or the information given by a member of his family.^z

To what cases restricted.

The writ of *ne exeat regno*, which enjoins the defendant from the departing the realm without the order of the court, is granted only where the debt amounts to an equitable and not a legal demand; for, in the latter instance, the plaintiff may secure himself by holding the defendant to bail if he is about to quit, unless in those cases wherein equity has a concurrent jurisdiction with a court of law, as where the debt arises from the balance of any account:^a moreover the demand must be clear, and a money demand, and actually due;^b but, even in this instance, if the plaintiff has had recourse to his remedy at law by means of bail, the court will not allow him a double security by granting this writ in addition thereto,^c neither will a *ne exeat regno* issue in respect of costs taxed in a Chancery suit.^d

What affidavit necessary.

By analogy to the courts of law, equity will require that the affidavit upon which the writ is granted shall as positively state the fact of the defendant's going abroad, and the exact amount of the equitable demand, as is required by law in the affidavit to hold to bail in respect of a legal debt,^e unless the demand be a matter

^y Moore v. Hudson, 6 Madd. 218; Barnard v. Laing, Vice-Chancellor of England, Dec. 8th, 1842.

^z 18 Ves. 355.

^a Jones v. Sampson, 8 Ves. 593.

^b Cook v. Ravie, 6 Ves. 283; Blaydes v. Calvert, 2 J. and W. 211.

^c Ex parte Branker, 3 P. W. 312-314.

^d Goodman v. Sayers, 5 Madd. 471.

^e Rice v. Gualtier, 3 Atk. 501; Shearman v. Shearman, 3 Bro. C. C. 370, 10 Ves. 164.

of pure account, as in the case of partners and executors, where information and belief will be sufficient.^f

The court will, in general, discharge the writ upon the defendant giving sufficient security to abide the event of the suit,^g or by stating in his answer or affidavit that he has no intention of quitting the country, or that he is not indebted to the plaintiff;^h and for this purpose the answer, which is put in upon oath, may be read in opposition to the affidavit upon which the writ was granted.ⁱ

Under what cases the writ is discharged.

Where the writ is to restrain the party from going to Scotland, and he gives the necessary bond, the condition must be not to go out of the realm, *or to Scotland*; for if it only be not to go out of the realm, the party going to Scotland merely will not forfeit the bond or recognizance.^j

The expressions “beyond seas” and “out of the realm” were synonymous. Formerly the term “beyond the realm” or “beyond the seas” embraced Scotland also, as being then out of the realm; but, since the Union, Scotland being part of the realm, it became necessary to make some further provision in respect to the *ne exeat regno*. This writ, if it simply restrained the parties from going out of the *realm*, permitted them to go to Scotland, which was out of the *jurisdiction*; therefore, if it were required to restrain them within the jurisdiction, it was deemed necessary to alter the writ and the recognizance by extending the restraint to Scotland *by name*. The phrase “out of the realm” is not now used, and the legislature, by

^f Jackson v. Petrie, 10 Ves. 165.

^g Atkinson v. Leonard, 3 Bro. C. C. 218; Roddam v. Hetherington, 5 Ves. 91.

^h Harr. Ch. Pr. 536.

ⁱ De Carrière v. De Calonne, 4 Ves. 577; Grant v. Grant, 3 Russ. 598.

^j Donne's case, 1 P. W. 263.

CHAP. II. altering it to "beyond the seas," seems to have pointed to this very case of Scotland.^k

Privilege of
peerage.

If the defendant claim the privilege of peerage, the plaintiff must pray for a letter missive. If the attorney-general be made a defendant, the prayer must be that he may answer the bill upon being served with an office copy thereof.

Lord Clarendon's order.

It is one of the orders of Lord Clarendon, "That no counsel do put his hand to any bill, answer, or other pleading, unless it be drawn or at least presented by himself in the proper draft before it be engrossed; and counsel are to take care that the same be not stuffed with repetitions of deeds, writings, or records in *hæc verba*, but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without long and needless traverses," etc.

^k See *Ruckmaboye v. Mottehund*, before the Privy Council, upon appeal from the Supreme Court at Bombay, 22 Law Times, 203; Moor's Cas. Privy Coun. p. 4.

CHAPTER III.

OF THE PARTIES TO A SUIT.

It has been somewhat quaintly said that “a court of equity delighteth to do complete justice, and not by halves;”^a and thus, for the purpose of doing this complete justice between all the parties interested in the suit, and to pronounce such a decree as will prevent future litigation, and protect the interests of those who are called upon to obey its decree, the strict rules of the court demanded that all persons materially interested, however numerous, should be made parties to the suit, unless where it was impracticable to bring them all before the court; as if one or more of the persons who were interested in the subject of the suit happened to be out of the jurisdiction of the court, in which case, proceedings might have been had without such persons against all the others. But it was and still is the practice to add the name of a person out of the jurisdiction to the bill, in order that his interests may appear in connection with the other parties on the record; and where it appears by the bill that the sole plaintiff *resides* abroad, the defendant may, by making immediate application, as soon as he has gained information of the fact, obtain an order for the plaintiff to give

Usual practice respecting parties to a suit.

^a Knight v. Knight, 3 P. Wms. 333.

CHAP. III. security for costs, and that he may not be forced to answer until a certain time has elapsed from the plaintiff giving the security required; and if the fact of the plaintiff residing abroad come to the defendant's knowledge in the course of the cause, he may apply at any time, provided he has not waived his right by any subsequent proceedings.^b But no other order will be allowed where there are co-plaintiffs residing in England.^c

Exceptions
to the gene-
ral rule.

The court, however, for the purpose of saving expense, delay, and the inconvenience of a multitude of suits by persons claiming similar equities, would sometimes permit a few persons out of a larger number to file a bill on behalf of themselves, and all others in the same interest.^d Thus, in the common case, where a few creditors instituted a suit on behalf of themselves and all other the creditors of their debtor deceased, the decree being made for the general benefit of such creditors, all the others who were not made actual parties to the bill might have come in under the decree, and claim satisfaction out of the real and personal estate of the deceased, equally with those creditors in whose name the bill was filed. In the same manner a legatee might substantiate proceedings in equity on behalf of himself and the other legatees. It was also held that one of the shareholders of a canal was at liberty to file a bill on behalf of himself and the rest of the shareholders, for the purpose of setting aside an agreement entered into by the commissioners of the canal, contrary to the provisions of the Act of Parliament under which the canal was made.^e Generally speaking, however, where the equity of the bill touches any particular person, so as

^b *Weeks v. Cole*, 14 Ves. 518.

^c *Walker v. Easterby*, 6 Ves. 612.

^d *Cockburn v. Thompson*, 16 Ves. 321; *Evans v. Stokes*, 1 Keen, 24.

^e *Gray v. Chaplin*, 2 Sim. and S. 267.

to obtain from him a benefit, or fasten upon him a duty, CHAP. III.
he is a necessary party.^f

In determining the question as to the proper parties to a suit, the court proceeds upon two leading rules: the one is, that, no decree shall be binding upon any one who is not considered by the court either as a party, or as one claiming under a party to the suit;^g and it may be laid down, as a general principle, that all persons who have in the object of the suit an interest apparent upon the record are necessary parties.^h The other rule is that, when a decree is once made, it shall provide for all the rights of the several parties interested in the subject of the suit. This principle of doing complete justice is peculiar to a court of equity.

Principles upon which the court decides the question as to parties.

In reference to the relaxation of the ancient rules of the court, by allowing a number of persons to be represented by a few having a mutual interest in the subject of the suit, Lord Cottenham said, that he thought it "the duty of the court to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."ⁱ

Where, under the circumstances above referred to, some persons are allowed to institute a suit on behalf of themselves and others, the principal objects to which attention must be directed, as it regards the plaintiffs, are the following:—"1. That it must appear upon the

Rules relating thereto.

^f Calvert's Par. to a Suit, 16, 2nd ed.

^g Daniell's Prac. 390; *Smith v. Effingham*, 7 Bea. 371.

^h Calvert's Par. to Suits, 13.

ⁱ *Taylor v. Salmon*, 4 My. and Cr. 141.

CHAP. III. record that the persons represented by the plaintiffs are numerous; 2. That the objects of the suit are beneficial both to the persons represented, and also to the plaintiffs on the record; 3. That they all have a community of interest in all the objects of the suit; 4. That all the persons interested are, personally or by representation, before the court."^j

Another reason for relaxing the rule.

Another reason for relaxing the general rule is, where suits are allowed to be instituted against certain persons on behalf of others as well as themselves;^k and then the general principles to be attended to in this form of suit are the following:—"1. That the persons against whom the proceedings are taken are too numerous to be brought before the court; 2. That there are defendants on the record, who will fairly and honestly try the right, and will respectively maintain all the several interests which are adverse to those of the plaintiffs; 3. That the rights in issue are in the nature of general rights."^l

Bill against an acting executor's representative and the surviving executors of testator.

Formerly, where there were several executors, and all renounced but one, who alone proved the will and died, the bill must have been filed, not only against his executors, but against the surviving executors of the original testator, who might at any time have come in and proved the will,^m notwithstanding they had renounced. Since the passing of the 20 & 21 Vict. c. 77,* however, it would seem that it would not now be proper to file the bill against the surviving executors who had renounced; for it is provided by section 79 of the Act, that where any person renounces probate of the will of which he is appointed executor, or one of the executors, the right of such per-

^j Calv. 44.

^k Adair v. New River Company, 11 Ves. 444.

^l Calv. 53.

^m 1 Cox, 426.

* An Act to amend the law relating to Probates and Letters of Administration.

son in respect of the executorship shall wholly cease, and the administration of his effects shall without any further remuneration devolve and be committed in like manner as if such person had not been appointed executor. But an executor who does not prove is not liable for the default of an executor who has proved; and, as long as he does not prove, he is merely liable for what he actually receives.ⁿ

In all suits relative to charitable funds, the attorney-general must be made a party; but he is not a necessary party where a private charity is the subject of the suit,^o nor in respect of a legacy given to a charity on a bill filed against an executor for an account.^p

Attorney-General
party to a
charity suit.

In illustration of the above rules, the student will do well to consult the principles contained in the following cases, for the arrangement of which the writer is indebted mainly to Mr. Welford's Pleadings in Equity. In *Manning v. Thesiger*,^q where, under a settlement, a married woman appointed property to parties who were very numerous, certain of them were allowed to file a bill on behalf of themselves and the other appointees, in respect of the property, notwithstanding the general rule of the court, that all appointees, *cestuis que trust*, are necessary parties. In *Croker v. Perrott*, alluded to in the margin of the above-cited case, where a bill had been filed by one of several children, appointees of their mother, to set aside the appointment on the ground of unfairness of distribution, it was held that all the children who were appointees need not be parties, because they might go in before the master in respect of their several claims.

Welford's
Pleadings.

Where a suit is for the general administration of a Personal re.

ⁿ *Lowry v. Fulton*, 9 Sim. 123.

^o 3 Atk. 277.

^p *Chitty v. Parker*, 4 Bro. C. C. 38.

^q 1 Sim. and Stu. 107.

CHAP. III. testator's estate, and there is no personal representative
 presentative necessary where suit for general administration. before the court, though two of the executors, who are out of the jurisdiction, together with the executrix of one of the executors who had not proved, are made parties to the bill, and process is prayed against them in the usual manner, yet the bill will be dismissed with costs, unless, pending the time that the cause stands over, one of the two surviving executors shall come within the jurisdiction or appear.^r

Obligee of bond.

It has been held that, where an obligee to a bond, or a judgment creditor, assigned their respective interests, it was necessary to make them parties, because, at law, the right of action remains in them.^s

Brace v. Harrington.

But in *Brace v. Harrington*,^t Lord Hardwicke said that, where the whole equitable interest is assigned over, a person who has a legal interest need not in every case be a party; and, where both assignor and assignee of a debt filed a bill for its recovery, stating the assignment, it was held not to be necessary to prove such assignment, though the defendants stated their ignorance of it, for the assignment was a matter between the two plaintiffs.^u

Rights of assignees of copyright must clearly appear.

A demurrer to a bill filed by a publisher, for relief against the infringement of a copyright which he had purchased, was allowed, as it did not appear that the author had assigned the copyright, and who ought therefore to have been made a party to the suit, as being the person who had the legal right in him.^v

Privity of interest.

Although a person may be interested in a share of the produce arising from the sale of property made by trustees, yet he will not be allowed to join in a bill for spe-

^r *Lowry v. Fulton*, 9 Sim. 104.

^s Mitf.

^t 2 Atk. 235; see also *Blake v. Jones*, 3 Anstr. 651.

^u *Ryan v. Anderson*, 3 Madd. 174; *Logan v. Fairlie*, 2 Sim. and Stu. 284.

^v *Colburn v. Duncombe*, 9 Sim. 151.

cific performance of a contract for sale, the contracting parties themselves being the only proper persons for that purpose.^w CHAP. III.

An uncertificated bankrupt who has a possessory right to a tenement, may maintain a suit to restrain a nuisance, without his assignees being made parties.^x Uncertificated bankrupt.

The acceptor of an accommodation bill of exchange, instituting a suit against the holder, must make the drawer a party;^y but the last indorsee of a lost bill of exchange may file a bill against the acceptor, without making any of the prior indorsees or the drawer parties.^z Acceptor of accommodation bill.

Where an agreement for a lease had been entered into by the trustees of a numerous company for the use of the company, a demurrer to a bill filed for a specific performance of the agreement, on the ground that none of the members of the company were parties to the suit, was allowed;^a and where a bill was filed for enforcing the execution of a creditor's deed, the scheduled creditors who had executed were held to be necessary parties.^b Agreement for lease on behalf of a numerous company.

Where the trust property is personal and ascertained, a *cestui que trust* entitled to an aliquot part thereof, may institute a suit against the trustees for the same, without making the other claimants parties to the bill.^c Personal property held in trust.

But in *Hutchinson v. Townsend*,^d where parties were entitled to one-fourth of an ascertained fund vested in trustees, although the court, upon the authority of *Smith v. Snow*, allowed some of them to sue for their one-fourth *Hutchinson v. Townsend.*

^w *Wood v. White*, 4 My. and Cr. 483.

^x *Semple v. The London and Birmingham Railway Company*, 9 Sim. 209.

^y *Penfold v. Nunn*, 5 Sim. 405.

^z *Macartney v. Graham*, 2 Sim. 285; *Davies v. Dodd*, 4 Price, 176; *Pearce v. Creswick*, 2 Hare, 286.

^a *Douglass v. Horsfall*, 2 S. and S. 184.

^b *Cocker v. Lord Egmont*, 6 Sim. 311.

Smith v. Snow, 3 Madd. 10.

^d 2 K. 675.

CHAP. III. share without making the persons entitled to the other three-fourths parties to the suit, yet the master of the rolls expressed his disapprobation respecting suits so constituted, and said that it would be very inconvenient to encourage suits of the like description. It is presumed however that the question is now set at rest by the 15 & 16 Vict. c. 86, s. 42 (rule 4). (*Vide* Appendix B, *Parties*.)

Bill for administration of assets.

When there is a bill filed to administer the assets of a person deceased, it is usually necessary to bring before the court the personal representative of a deceased representative as a co-defendant with a continuing or present representative,^e although a different doctrine once prevailed.^f But it seems that it is not necessary to make an executor who has not proved a party to the suit, although he may not have renounced.^g

In a bill for account, personal representative a necessary party.

The court cannot deal with the property of a deceased debtor where the bill is filed for an account, unless his personal representative be before the court and made a party to the record: thus, where the debtor died in India, and his money was bequeathed to the English agent of his executor, who resided in India, and who proved the will there, it was held, on a bill being filed by a creditor of the testator against such agent, praying an account and payment of the money to the accountant-general for security, to be necessary to take out administration in this country, and to bring the executor before the court.^h

A suit was instituted for seeking an account of the assets of a person who died intestate in India, possessed

Holland *v.* Prior, 1 M. and K., overruling Phelps *v.* Sproule, Sim. 321.

See Ryan *v.* Roche, 2 Molloy, 437 *n.*

Cranmer *v.* Morton, 2 Molloy, 108; Davies *v.* Williams, 1 Sim. 5, and *supra*, 270.

^h Logan *v.* Fairlie, 2 S. and S. 284; Lowe *v.* Fairlie, 2 Madd. 101.

by his personal representative there. A personal representative of the intestate constituted in England, was adjudged to be a necessary party, although the deceased did not appear to have any assets here at the time of her decease.ⁱ CHAP. III.

Where a suit is instituted to carry out the trusts of a will, in which a discovery is sought, the insolvency of the executor or administrator is no reason for his not being made a party; for a discovery of the assets may not be made without him.^j A bankrupt also may, for the same reason, *i. e.* discovery, be made a party to a suit against the assignees. Insolvency of personal representative.

Where a party, obligor to a bond, binding upon his heirs, dies, and a bill is filed for satisfaction out of the real estate devised, the devisee and heir-at-law of the debtor jointly, as well as his personal representative, are necessary parties, by virtue of the 3 & 4 Will. & Mary, c. 14, to prevent fraudulent devises.^k The reason laid down by Lord Hardwicke, in *Galton v. Hancock*,^l is that the provision of the Act was introduced for the benefit of the creditors merely, without any regard either to the *heir* or *devisee*, so as to entitle the creditor to a new formed writ, and to bring a new action (*i. e.* an action of debt upon his bond and specialties, against the heir-at-law of the obligor and devisee jointly); for otherwise the devisee and heir-at-law might collude to play off the will or not, just as it should suit them best, therefore it was a necessary and wise provision of the Act to join the heir and devisee in the action, to secure the creditor at all events. Heir-at-law and devisee of obligor necessary to a suit for satisfying the bond.

It was held by Lord Hardwicke,^m that an obligee of a 32nd Ord.,
26th August
1841.

ⁱ *Tyler v. Bell*, 2 My. and Cr. 89.

^j *Ashurst v. Eyre*, 2 Atk. 51; S. C., 3 Atk. 341.

^k *Gawler v. Wade*, 1 P. Wms. 99; *Warren v. Stawell*, 2 Atk. 125.

^l 2 Atk. 432.

^m *Madox v. Jackson*, 3 Atk. 406.

CHAP. III. joint and several bond must bring all the co-obligors before the court; but the 32nd Ord., 26th August, 1841, has produced a material alteration in cases where different parties are liable to the same account. Before this order, where a bill had been filed by an obligee to a joint and several bond, all the obligors, whether principals or sureties (unless when one of such sureties happened to be insolvent), must have been made parties (7 Cons. Or. r. 2).

Real and personal representatives of purchasers necessary parties to a bill for specific performance.

To a bill filed by a vendor for specific performance, not only must the heir or devisee, the real representative of the deceased purchaser, be brought before the court, but also his personal representative; for, as the contract cannot be deemed complete (although possession be delivered) until the money be paid, it remains during that interval a specific lien upon the premises.ⁿ

Bill for carrying out the trusts of a will.

Formerly, when a bill was filed to carry the trusts of a will disposing of real estates by sale or charge of the estate into execution, the heir-at-law was an essential party; although otherwise, had it been a trust created by deed to pay debts,^o unless it was charged and proved that the heir was out of the jurisdiction. In such a case the court, upon full evidence of the due execution of the will and the sanity of the testator, would decree the execution of the trust, which evidence could not have been read against the heir-at-law, should he afterwards have disputed the will; in the latter event the title still remained uncertain.^p

31st Order, 26th August, 1841.

By the 31st Ord., 26th August, 1841, and 7 Cons. Or. r. 1, in suits to execute the trust of a will, the heir-at-law, as before observed, need not be a party.

ⁿ *Townsend v. Champerdowne*, 9 Price, 136; *Smith v. Hebbert*, 2 Dick. 730; *Harrison v. Harrison*, 1 R. and My. 71.

^o 3 P. Wms. 91.

^p *Williams v. Whuyates*, 1 Bro. C. C. 399; *French v. Baron*, 2 Atk. 120; S. C., Dick. 138.

There is a distinction in the case where the lord of a CHAP. III.
manor ought to be made a party to a suit relating to Lord of a
manor.
copyholds and where not. Thus, in an anonymous case,
in 6 Vin. Abr. 239, Mich. Vac. 1720, it was held that to
a bill filed for the surrender of a copyhold estate for lives,
the lord is a necessary party; because, when once the
surrender is made, the estate is in the lord, and he is not
bound to re-grant it: but in case of copyholds of inhe-
ritance it is otherwise, for there he need not be a party.

In a bill by a mortgagee to foreclose, it is a general Bill of fore-
closure.
rule that all persons whose interests are to be affected
by the decree ought to be made parties to the suit,^a un-
less they became incumbrancers *pendente lite*, notwith-
standing their interests would be equally bound by the
decree, as they are deemed to have purchased without
constructive notice.*^r The principle of making incum-
brancers parties is that, with regard to prior mortgagees,
their rights are paramount to those of the party fore-
closing; those who are subsequent must be made parties,
because their interests would otherwise be affected with-
out an opportunity of protecting them.^s

Judgment creditors, whose judgments have been entered Judgment
creditors.
up subsequently to the plaintiff's security, must be made
parties to a bill of foreclosure. It is not sufficient that they

^a Bishop of Winchester *v.* Beavor, 3 Ves. 314; Adams *v.* St. Leger, 1 Ball. and Bea. 182; Tuite *v.* Pallas, 1 Hogan, 261; Whistler *v.* Webb, Bunb. 53; Calverley *v.* Phelps, 6 Madd. and Gel. 231; Palk *v.* Clinton, 12 Ves. 58.

* But no *lis pendens* is now constructive notice, unless registered in the Common Pleas, in pursuance of 2 & 3 Vict. c. 11, s. 7.

^r Garth *v.* Ward, 2 Atk. 174; Yates *v.* Hambly, *ibid.* 237.

^s Draper *v.* Earl of Clarendon, 2 Vern. 518; Godfrey *v.* Chadwell, *ibid.* 601; Morret *v.* Western, *ibid.* 663; Hobart *v.* Abbott, 2 P. Wms. 643; Delabere *v.* Norwood, 3 Swan. 144; Sheppard *v.* Grunnell, *ibid.* 151; Rose *v.* Page, 2 Sim. 471; Richards *v.* Cooper, 5 Bea. 304.

CHAP. III. should be served with copies of the bill under 23rd Ord., August, 1841.^t

Distinction
between
those who
must and
those who
may be
parties.

There is a distinction observed between persons who are indispensable parties to the record, and those who may with propriety be made so.^u Thus, to a bill of foreclosure, if the personal representative of the mortgagor be interested in the equity of redemption, as where the mortgage was for a term of years, he must not be made a party.^v But it is necessary to bring him before the court for the sale of the mortgaged property, as no account can be taken in his absence, because the personal estate must be first exhausted, before the court will direct the real estate to be sold.^w But, ordinarily, in a bill to *foreclose*, it is not necessary that the personal representative of the mortgagor should be made a party to the suit; for, as the heir of the mortgagor alone has the right to the equity of redemption which it is sought to foreclose, he has no right to demand that the personal representative should be joined to relieve him out of the personal estate, since he has his own remedy in equity against him, for compelling payment out of the personal assets of the deceased mortgagor.^x Where, also, the devisee or heir of the mortgagor files his bill to *redeem*, he may properly make the personal representative of the mortgagor a party defendant, because either may require the personal assets to be applied in exoneration of the mortgaged estate.^y In the case of the mortgagee, how-

^t Adams v. Paynter, 1 Coll. N. C. 530; 9 Jur. Dig. 133.

^u Story's Eq. Pl. 140, n. 4, and the cases there referred to.

^v Bradshaw v. Outram, 13 Ves. 235; Cholmondeley v. Clinton, 2 Jac. and W. 135.

^w Christopher v. Sparke, *ibid.* 229.

^x Duncombe v. Hansley, 3 P. Wms. 333 n. (A); Coop. Eq. Pl. 38.

^y Howell v. Price, 1 P. Wms. 701; Waring v. Ward, 7 Ves. 376; Bradshaw v. Outram, 13 Ves. 234; Robinson v. Gee, 1 Ves. 352;

ever, it is different; for he may elect to make the personal representative a party to obtain payment of the mortgage out of the personal estate.^z CHAP. III.

Where a mortgagee dies without devising the mortgaged estate, it descends to his heir, who is a trustee thereof for the executors, who are the proper parties to receive the mortgaged money.^a Heir of mortgagee trustee for executor.

The statute 7 & 8 Vict. c. 76, s. 9, empowering an *executor* or *administrator* of a deceased mortgagee to convey, by deed or surrender, the legal estate under certain circumstances, has been already referred to, as having been repealed.^b

When parties are too numerous to be brought before the court, and, in such cases, a few are allowed to file a bill on behalf of themselves and the rest of the persons interested, they must not assume to themselves a corporate character;^c and the bill must distinctly state that it is on behalf of the plaintiffs and of all the persons interested, and even those who are not directly interested, in order that they may come in under the decree, and share with the plaintiffs the benefit thereof, or show error upon the decree to entitle themselves to a re-hearing. And the court will entertain a petition or a bill, to bring more distinctly before the court the rights of the absent parties.^d Large bodies in the nature of partnerships. And where a bill is filed against a few persons,

Knight v. Knight, 3 P. Wms. 333-358; *Rylands v. Latouche*, 2 Bligh, 566-584.

^z *Bradshaw v. Outram*, 13 Ves. 235.

^a Co. Litt. 288, b. n. (1); 2 Vent. 348, 351; 3 Bart. Elem. Convey. c. 6, s. 5, p. 349.

^b Ante, p. 198.

^c *Lloyd v. Loaring*, 6 Ves. 773.

^d *Adair v. The New River Company*, 11 Ves. 444; *Cockburn v. Thompson*, 15 Ves. 326; *Good v. Blewitt*, 13 Ves. 397; S. C., 19 Ves. 336; *Angel v. Hadden*, 1 Madd. 529; *Weak v. West Middlesex Water Company*, 1 J. and W. 369; *Weld v. Bonham*, 2 S. and S. 91.

CHAP. III. as representing a numerous class, it must allege that the suit is brought against them in the representative character.^e So, if they do not sue in a corporate capacity, a few of the members of a lodge of freemasons may institute a suit on behalf of themselves and others, provided the object of justice would be otherwise frustrated;^f and, in many other instances, where the number of proprietors was very numerous, it was held to be sufficient, there being a privity of interest, and one common responsibility, to make some of them defendants on behalf of themselves and the whole company. The court will, however, in these cases, see that there shall be a proper representation of all substantial interests before the court.^g

But, where a suit was instituted on behalf of a friendly society against the trustees, all the members were required to be parties.^h

Officer of a
public com-
pany.

In most public companies they have their recognized officers, personating the company itself: these functionaries, therefore, may be sued without making all the directors and shareholders parties to the suit.ⁱ And where a committee has been appointed to act on behalf of a large body, who had formed themselves into a society, and who had, as such committee, contracted debts with several tradesmen, a suit was held to be maintainable against the committee alone, without making the rest of the members parties.^j

One creditor Where a bill is filed by one creditor on behalf of him-

^e *Lanchester v. Thompson*, 5 Madd. 13.

^f *Lloyd v. Loaring*, 6 Ves. *ante*.

^g 11 Ves. 429; *Small v. Attwood*, 1 Younge, 407-458; *Walburn v. Ingleby*, 1 M. and K. 76. See 2 S. and S. 18; 4 Russ. 562-576.

^h *Beaumont v. Meredith*, 3 Ves. and B. 180.

ⁱ *Attwood v. Small*, per Lord Cottenham, Feb. 3, 1841; 2 Beav. 539 *n.*; *ibid.* 538.

^j 1 Bro. C. C. 101.

self and all other creditors of the deceased debtor, for a general account of his property, those who are absent, provided they have not been guilty of any wilful default, are entitled to share in the assets which those before the court may have received.^k This is done by coming in under the decree for proving their debts before the chief clerk, or be excluded from all benefit under the decree.^l The court, in such a case, takes upon itself the whole administration of the assets, both real and personal, and thus assuming a paramount authority over the executors or trustees, will, by the decree, exonerate them from all further liability in the discharge of their duties.

But, in case one creditor sues on behalf of himself and all other creditors, it is necessary that he should have one common interest with the creditors generally. Thus, it has been held that a mortgagee cannot sue on behalf of himself and all the creditors, in respect to the mortgage debt; for his interest is peculiar to himself: nor where a creditor seeks to establish a priority of right can he sue in this manner; for, as he has no common interest with the creditors at large, each one of them is interested in contesting his claim, and must, therefore, all be made actual parties to the suit.^m

One creditor may file a bill for himself individually; and, so far as other creditors of the same degree, he may obtain priority, by means of the decree in his favour, over those who have not used the same diligence:ⁿ but

^k *David v. Frowd*, 1 M. and K. 200; *Gillispie v. Alexander*, 3 Russ. 130.

^l Mitf. by Jeremy, 166; *Story's Eq. Pl.* 82, *n.* (r); *Law v. Rigby*, 4 Bro. C. C. 66; *Anon.*, 9 Price, 210; *Good v. Blewitt*, 19 Ves. 336; *Gifford v. Hort*, 1 Sch. and Lef. 419.

^m *Burney v. Morgan*, 1 S. and S. 358-362; *Newton v. Earl of Egmont*, 5 Sim. 137; S. C., 4 Sim. 574-585; *Jones v. Garcia del Rio*, 1 Tur. and R. 297.

ⁿ *Hall v. Benney*, 6 Ves. 738; Mitf. by Jeremy, 166-7.

CHAP. III. he is not allowed, by these means, to acquire a priority over creditors of a superior degree, and, in some cases, he will not be permitted to acquire a preference to those of an equal degree.^o

Where there are persons who claim the personal estate under a general description, as the relatives or next of kin to a party who died intestate, a suit may be maintained by one claimant on behalf of himself and the other claimants.^p

Partners.

In the case of partners it is usual, where a bill is filed by or against them, to bring all the partners before the court.^q If one of the partners be out of the jurisdiction, a decree for a debt in which all the partners are liable may be had against those who are within the jurisdiction, without making the absent partner a party to the suit.^r It is different however where a bill is filed among themselves for an account and dissolution ; for, in that case, if one of the partners be out of the jurisdiction, the suit cannot proceed.^s

All adventurers necessary parties, where profits and losses are shared.

Where all the profits and losses are to be shared in certain stipulated proportions, all the adventurers in the undertaking must be made parties to the suit.^t When one of several partners dies, the surviving partners are necessary to be joined in a suit against the personal representative of such deceased partner for a joint debt, as they have an interest in disputing the debt, and have a

^o *Newland v. Champion*, 1 Ves. 104; *Peacock v. Monk*, *ibid.* 131.

^p *Mitf. by Jer.* 169; *Montagu v. Nucella*, 1 Russ. 166.

^q *Moffat v. Farquharson*, 2 Bro. C. C. 338; *East India Company v. Neave*, 5 Ves. 172; *Weymouth v. Boyer*, 1 Ves. jun. 417; *Fallows v. Williamson*, 11 Ves. 313; 3 Swan. 139.

^r 2 Atk. 510; *Cowslad v. Cely*, Pre. in Chan. 83.

^s *Beaumont v. Meredith*, 3 Ves. and B. 180; *Evans v. Stokes*, 1 K. 24; *Van Sandau v. Moore*, 1 Russ. 441.

^t 2 You. and Coll. Eq. Ex. R. 61.

right to be heard in the office of the chief clerk in taking the account.^u CHAP. III.

But whether the surviving partners, suing for a partnership debt, are bound to join the personal representative of the deceased partner may be subject to doubt.^v

Where the bill alleges that a person who would have been a necessary party died insolvent, without leaving assets to pay his debts, it is not necessary to make his personal representatives parties to the suit.^w

In the case of joint-stock companies, when the body of members is large, and a suit is instituted for winding up the affairs of an insolvent joint-stock company under the decree of the court, and praying that a sale of the partnership property made by the directors might be declared void, and for an account, all the members, however numerous, must be made parties by reason of the diversity of interests. The principle of a few persons being permitted to sue on behalf of themselves and a more numerous body extends only to cases in which there is evidently a community of interest between the plaintiffs and those whom they represent.^x And thus, where relief is sought against injuries done to their common right, a few out of a large body may entertain a suit on behalf of themselves and the rest, although the assent of the majority be not obtained without making the attorney-general a party to the suit; but, should the whole body concur in the abuse, the suit must be instituted by the attorney-general.^y Joint-stock companies.

^u *Wilkinson v. Henderson*, 1 M. and K. 582-588; *Holland v. Prior*, 1 M. and K. 237; *Blackburn v. Jephson*, 3 Swan. 139.

^v *Cockburn v. Thompson*, 16 Ves. 326; *Madox v. Jackson*, 3 Atk. 406; *Story's Eq. Pl.* 130, n. (r); *Anon.*, 2 Freem. 127.

^w *Seddon v. Connell*, 10 Sim. 79.

^x *Beaumont v. Meredith*, 3 Vea. and B. 180; *Long v. Yonge*, 2 S. 369; *Evans v. Stokes*, 1 K. 24.

^y *Bromley v. Smith*, 1 Sim. 8.

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Where
members of
a company
are very
numerous.

Also, when the members of a company are very numerous, they cannot file a bill for a dissolution of partnership without making all the members parties.^z And where several shareholders assign their interests to others and constitute such appointees their attorneys to recover those deposits, the assignees cannot institute a suit on behalf of themselves and their assignors only, but the latter, however numerous, must be made parties.^a And although it may be usual, in filing a bill against a company, to direct proceedings against the public officer of the company, yet, where there is a litigation amongst the members of the company as partners, such public officer ought not to be brought before the court as representing the company.^b

Rule as to
restraining
parties be-
yond tenant
in tail in
settled
estates.

As a general rule, when settled estates are subject to dispute, it is usual not to bring before the court any parties representing that estate beyond the tenant in tail, and not those in remainder or reversion, after such vested estate of inheritance^c (except where an infant has the first estate of inheritance as tenant in tail^d), and a decree against a person having that vested estate of inheritance is binding on those in remainder or reversion. But it seems that all persons having interests prior to the first estate of inheritance, together with the owner of that estate of inheritance, must be brought before the court, so that if he who has the first estate of inheritance should happen to die pending the suit, the person who has the next estate of inheritance must be made a party to the record. Also, if after the suit is instituted, and pending the same, one happen to be born claiming an

Long *v.* Yonge, 2 Sim. 369.

^a Blair *v.* Agar, 1 Sim. 37.

^b 10 Sim. 58.

^c 2 Madd. 183. See the cases cited there.

Lord Dursley *v.* Fitzhardinge, 6 Ves. 251.

interest prior to any estate of inheritance, he must be made a party; and if, by the determination of a contingency, a new interest arise not subject to be defeated or destroyed by a previous estate of inheritance, the person entitled to that interest must be brought before the court.^e CHAP. III.

But devisees filing a bill to establish a will and carry the trust into execution, have no right to call upon persons who claim paramount the will to litigate such claims with them.^f Devisees.

Where proper persons cannot be brought before the court the reason of such inability must be stated in the pleadings, as where a representative is a necessary party and the representation is in litigation.^g

When parties are out of the jurisdiction of the court, and they are mere passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, a complete determination may be obtained against them.^h But if the person out of the jurisdiction be an active party in the execution of the decree, or if his rights be wholly distinct from those of the other parties, the court cannot proceed to a determination against him.ⁱ And when the party is so absent, that fact must be positively stated in the bill. Parties out of the jurisdiction.

If the absolute disposition of the property be vested in trustees, the persons interested under the trust need not be made parties in a suit instituted against the trustees by persons having a prior demand to the creation Where cestuis que trusts not necessary.

^e Mitf. by Jerem. 174; *Sherrit v. Birch*, 3 Bro. C. C. 229.

^f *Devonsher v. Newenham*, 2 Sch. and Lef. 210.

^g *Plunket v. Penson*, 2 Atk. 51; *Jones v. Frost*, 3 Madd. 1.

^h Mitf. by Jerem. 164; *Meux v. Maltby*, 2 Sw. 278; *Stor. Eq. Pl.* 67.

ⁱ Mitf. by Jerem. 165; *Fell v. Brown*, 2 Bro. C. C. 277; *Brown v. Blount*, 2 K. and M. 83; *Roveroy v. Grayson*, 3 Swan. 145 n.

CHAP. III. of the trust.^j Where there are trustees appointed of a real estate for the payment of debts or legacies, they may maintain or defend a suit without bringing before the court the creditors or legatees for whom they were appointed, and whose rights will be bound by the decision against the trustees.^k

For when the interest of those who are beneficially entitled is completely represented by the trustees, and the trust is of such a nature as to produce a great inconvenience amounting to a denial of justice, if all the *cestuis que trust* were required to be brought before the court the trustees may alone sustain a suit, either as plaintiffs or defendants.^l

Contingent
limitations.

If there be a number of contingent limitations of a trust, the trustees, together with the party who has in himself the first estate of inheritance, are all that are necessary, among those who are interested in the estate, to be brought before the court.^m

Bill by *cestui que trust*
against trustees.

Where a suit is instituted by a *cestui que trust* against trustees who are implicated in one common breach of trust, he may either bring his suit against all or one of them only,ⁿ although it was held, in *Munch v. Cockerell*,^o that where several trustees are implicated in a breach of trust, the *cestui que trust*, in order to recover the trust fund, must file his bill against all the trustees who are living and the representatives of such of them as are

^j Mitf. by Jerem. 175.

^k Ibid. 174; 3 Ves. 75; *Curteis v. Candler*, 6 Madd. 123; *Douglass v. Horsfall*, 2 S. and S. 184; Pr. in Ch. 275.

^l Mitf. by Jerem. 176-179; 2 Bro. C. C. 225; see *Osbourne v. Fellows*, 1 R. and My. 743; and the case of *Yates v. Hambly*, 2 Atk. 237, there cited.

^m *Hopkins v. Hopkins*, 1 Atk. 591; *Cholmondeley v. Clinton*, 2 Jac. and W. 133.

ⁿ *Walker v. Symonds*, 3 Swan. 75; *Seddon v. Connell*, 10 Sim. 79.

^o 8 Sim. 219.

dead, and is not at liberty to proceed against some of them only. CHAP. III.

Where a bill for discovery is filed in aid of a defence to an action at law, a person who is not a party to the action cannot be joined as a co-plaintiff.^p

A decree against the person having such first estate of inheritance will generally be binding upon those in remainder or reversion, although, by a failure of the preceding estate, those in remainder or reversion may afterwards vest in possession.^q And such remainderman, subsequently becoming entitled in possession, may appeal from a decree made against a person having a prior estate of inheritance, but cannot avoid the effect of the decree by a new bill:^r for the owner of the first estate of inheritance virtually represents all subsequent estates,^s and if he be tenant in tail, with remainder over, it is competent for him to bar all these remainders over from having any interest whatever in the estate. There is however an exception where the owner of the first estate of inheritance happens to be an infant, for in such a case the next remainderman may properly be joined in the suit.^t

Decree against the first person taking the inheritance binding on those in remainder.

The General Orders of 26th August, 1841, have made considerable alteration as to the necessary parties in a suit; Orders 30, 31, 32, 39 and 40,* being more particularly framed for the purpose of facilitating the progress of a suit in the absence of interested parties, without incurring any risk to such parties, notwithstanding they are not mentioned on the record. Orders, 26th Aug. 1841.

^p *Irving v. Thompson*, 9 Sim. 17; *Bromley v. Holland*, 7 Ves. 3.

^q Mitf. 173; *Lloyd v. Johnes*, 9 Ves. 57; *Gifford v. Hort*, 1 Sch. and Lef. 384-408.

^r Ibid.; *Osbourne v. Usher*, 2 Bro. P. C. 314.

^s Story's Eq. Pl. 118.

^t *Lord Dursley v. Fitzhardinge*, 6 Ves. 251.

* These last two, *i.e.* 39 and 40, are, by virtue of the 43rd sect. 15 & 16 Vict. c. 86, no longer in force.

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30th Order.

Thus, by Order 30, trustees of real estate may represent their *cestuis que trust*; for it provides, "That, in all suits concerning *real estate* which is vested in trustees by *devise*, and such trustees are competent to *sell and give discharges* for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, *in the same manner* and to the same extent as the *executors or administrators* in suits concerning *personal* estate represent the persons beneficially interested in such personal estate; and in such cases it shall *not be necessary* to make the persons beneficially interested in such real estate or rents and profits, parties to the suit. But the court may upon the consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."^u

31st Order.

Order 31 directs, "That, in suits to execute the trusts of will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party, where he desires to have the will established against him" (7 Cons. Or. r. 1).

Principles
which go-
vern these
Orders.

The principles upon which these Orders were framed, are thus stated in *Faulkner v. Daniel*:^v—"A party may stand in one of three different positions. He may be a necessary party to a suit, because other parties to the record cannot have justice done them in his absence; or he may be a necessary party, as having an interest of his own, which interest the court may be able to protect by saving his rights in the decree; or he may have an interest of his own, which the court may not be able to protect if a decree be made in his absence."

^u See 15 & 16 Vict. s. 42, r. 9.

^v Per V. C. Wigram, 3 Hare, 212; *Morley v. Rennoldson*,—*Linkson*, 2 Hare, 586; *May v. Selby*, 6 Jur. 52; *Hill v. Ledbrooke*, *ibid.* 1078.

But it will easily be seen that notwithstanding the beneficial tendency of these few Orders of 1841, which were designed to bear upon the inconvenience and heavy expense arising out of the general necessity for making all persons claiming an interest under a suit parties thereto, much remained still to be accomplished in the task of facilitating and simplifying the progress of a chancery suit in respect to interested parties. Thus, by the 15 & 16 Vict. c. 86, s. 42, it is enacted,—That, it shall not be competent to any defendant in any suit in the said court to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said court, and any law or practice of the said court inconsistent therewith, shall be and is hereby abrogated and annulled.

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Defendant
not to take
objection for
want of par-
ties in any
case to which
rules herein
set forth
shall extend.

Although these rules hereafter mentioned are intended to save expense in chancery proceedings by considerably limiting the actual number of parties to a suit, yet they by no means abolish the ancient principles of the court, which require that all persons materially interested in a suit shall be made parties to the record; for, according to Rule 8, such persons must be served with notice of the decree, so that it will still be necessary to ascertain who those persons are who would, under the old practice, have been made parties to the suit. By referring to Order 23, 26th of August, 1841, and also to Orders 30–32, 39, and 40, of the same date, it will be seen that the notion of these present rules was shadowed forth by those Orders, but the Rules themselves are more ample.

Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

Rule 2. Any legatee interested in a legacy charged

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upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

Rule 4. Any one of several *cestuis que trust* under any deed or instrument may, without serving any other of such *cestuis que trust*, have a decree for the execution of the trusts of the deed or instrument.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 6. Any executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts.

Rule 7. In all the above cases the court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8. In all the above cases the persons who, according to the present practice of the court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall

be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the lord chancellor, apply to the court to add to the decree.

The time referred to is, by Order 40, 7th August, 1852, limited to one month after service^w (23 Cons. Ord. r. 18).

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.

This rule is applicable not only to administration suits but to all other suits, when the interest of the *cestui que trust* is represented by, and his powers vested in, the trustee.^x And the court has held that the representation of the *cestuis que trust* of real estate, under the same rule, in suits against them for foreclosure or sale, extended to the case of infant *cestuis que trust*, they not having the means of redeeming the mortgage, and to the trustees of subordinate interests under settlements of shares

^w *Clarke v. Clarke*, 20 Law Times, 81.

^x *Fowler v. Bayldon*, 9 Hare, Append. 78.

CHAP. III. of children in remainder; but not otherwise to adult
cestuis que trust.^y

The rule does not extend to cases where in a suit for foreclosure against an infant heir-at-law of the mortgagor the devisees in trust under the will of the mortgagor had disclaimed, and in the absence of any adult parties before the court who could redeem the estate.^z Nor does it apply to where the surviving trustees or representatives of trustees alone are parties; for in such a case the court will require the *cestui que trust* to be also represented in order to secure the due application of the trust fund.^a Nor in a suit to set aside a settlement on the ground that it had been obtained by the trustees (who were themselves interested under it) by fraud.^b

Practice of
 setting down
 a cause on
 objection for
 want of
 parties
 abolished.

Court may
 proceed in
 any suit, etc.
 without re-
 presentative
 of deceased
 person, or
 may appoint
 one.

The practice of the said court of setting down a cause merely on an objection for want of parties to the suit, shall be abolished (sec. 43).

This section abolishes Order 39, 26th of August, 1841.

If in any suit or other proceeding before the court it shall appear to the court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, and the order of the court shall bind the estate of such deceased person as if there had been a duly constituted legal personal representative of such deceased person who had been made a party to the suit.

^y Goldsmith *v.* Stonehewer, *ibid.* 38.; S. C., 22 Law Jour. 109; 17 Jur. 199.

^z Young *v.* Ward, 10 Hare, Append. 58.

^a Stansfield *v.* Hobson, 16 Beav. 189.

^b Read *v.* Prest, 3 Week. Rep. 30.

This provision will save the necessity of compelling a plaintiff to take proceedings in the ecclesiastical court, when there has been neither probate nor letters of administration taken out to a party deceased, who was interested in the suit, for the sake of compelling some person, either to prove the will or administer, who might afterwards be made a party to the suit, to represent the deceased.^c

Where a number of creditors were interested in property comprised in a trust deed, made for their benefit, they may proceed in a suit against the trustees without a person representative of the deceased debtor, the author of the trust, where no such representative existed, and the estate was insolvent, and, also, where an executor has died intestate and insolvent, and attempts to obtain representation to him has proved abortive.^d

This does not apply to the case in which it is desired to appoint a representative, and the estate is being administered by the court,^e nor where in a creditor's suit an administrator *ad litem* has only been appointed; as such a person does not sufficiently represent the deceased for the purpose of administering his estate,^f neither where the application is for paying money out of court;^g nor where a decree is sought to be obtained against parties personally.^h This was in a foreclosure suit in which the plaintiff was sub-mortgagee; for it was there stated that it was not the intention of the legislature that the suit should proceed without the representative of a deceased

^c 2 Kennedy's Code, 162, n. (c); *vide Ex parte Cramer re Stewart's Trusts*, 20 Law Times, 87.

^d *Band v. Randle*, 2 Week. Rep. 331; *Chaffers v. Headlam*, 9 Hare, Append. 46.

^e *Silver v. Stein*, 1 Drew. 295.

^f *Groves v. Levi*, 9 Hare, Append. 47; 16 Jur. 1061.

^g *Rawlins v. M'Mahon*, 1 Drew. 225.

^h *Bruiton v. Hughes*, 21 Law Times, 123.

CHAP. III. party against whom a decree is sought; but in whatever case it can be properly applied, that it should be in the discretion of the court when it sees that it can be done without danger to anybody. Under this section, the executors of a father who survived, and became sole next of kin of his deceased children, were allowed to be appointed by the court to represent the estates of the deceased children for the purpose of the suit.ⁱ

Creditor, etc., may summon executor, etc., to show cause why an order for administration of personal estate should not be granted.

Power to judge to order administration of such estate.

It shall be lawful for any person claiming to be a creditor, or a specific pecuniary or residuary legatee, or the next of kin, or some or one of the next of kin, of a deceased person, to apply for and obtain as of course, without a bill being filed, or any other preliminary proceedings, a summons from the master of the rolls or any of the vice-chancellors requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof by affidavit of the due service of such summons, or on the appearance in person or by his solicitor or counsel of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such judge shall require, it shall be lawful for such judge, if in his discretion he shall think fit so to do, to make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties; provided that such judge shall have full discretionary power to grant or refuse such order, or to give any special directions touching the carriage or execution of such order, and in the case of applications

ⁱ Swallow v. Binns, 9 Hare, Append. 46; 17 Jur. 295.

for any such order by two or more different persons or classes of persons, to grant the same to such one or more of the claimants or of the classes of claimants as he may think fit; and if the judge shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge may direct^j (sec. 45). CHAP. III.

A duplicate or copy of such summons shall, previously to the service thereof, be filed in the record office of the said court; and no service thereof upon any executor or administrator shall be of any validity unless the copy so served shall be stamped with a stamp of such office indicating the filing thereof; and the filing of such summons shall have the same effect with respect to *lis pendens* as the filing of a bill or claim (sec. 46). Copy of summons to be filed in record office of court.

This power to register the summons as a *lis pendens* will be by virtue of the 2 & 3 Vict. c. 11, section 7. By referring to the above section 45, it will be seen that a judge's order, under the summons therein mentioned, will have the force and effect of a decree; therefore, in order to charge the estate of the deceased, it ought to be immediately registered, under 1 & 2 Vict. c. 110.

It shall be lawful for any person claiming to be a creditor of any deceased person, or interested under his will, to apply for and obtain in a summary way, in the manner herein-before provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person where the whole of such real estate is by devise vested in trustees who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate; and all the provisions herein-before contained with respect to the application for such order in relation to the personal Creditor, etc., may obtain an order for administration of real estate.

^j See *Re Catling*, 20 Law Times, 59.

CHAP. III. — estate of a deceased person, and consequent thereon, shall extend and be applicable to an application for such order as last herein-before mentioned with respect to real estate (sec. 47).

This may be considered as a continuation of section 45, which relates solely to personal—this to real estates. It will be perceived that this section expressly refers to where the *whole* of such estate is by devise vested in trustees; from this it would seem, that unless the case should fall expressly under this provision, the proceedings must be by bill.*

Court may direct sale of mortgaged property instead of a foreclosure on such terms as it may think fit.

It shall be lawful for the court, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, and if the court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request (sec. 48).

This part of the Act will very greatly diminish the expense and delay of foreclosure suits, by the power which

* See Sir G. Turner's Act, 13 & 14 Vict. c. 35, and 23 & 24 Vict. c. 38, s. 14, referred to under "Special Case," *infra*.

it gives the court of directing a sale without determining the priorities of the mesne incumbrances, or of granting to each mortgagee his right to a separate time for redemption.^k When an application is made under this section for a sale of the mortgaged estate instead of a foreclosure, it must be applied for at the hearing; and if a decree be then made for foreclosure, it cannot afterwards on motion be converted into a decree for sale.^l

No suit in the said court shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but wherever it shall appear to the court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the court shall have power to grant such relief, and to modify its decree, according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit, and to give such directions as to costs or otherwise as may appear just and expedient (sec. 49).

Suit not to be dismissed for misjoinder of plaintiffs, but Court may modify its decree, according to special circumstances.

This section speaks for itself, and was acted upon in

^k *Anning v. Lavers*, 20 Law Times, 61; *Cator v. Reeves*, *ibid.* 105.

^l *Girdlestone v. Lavender*, 20 Law Times, 176.

CHAP. III. Clements *v.* Bowes,^m where an objection of misjoinder was removed notwithstanding all the plaintiffs were not named upon the record.

No suit to be objected to because only declaratory order sought.

No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief (sec. 50).

Court may decide between some of the parties without making others interested parties to the suit.

It shall be lawful for the court to adjudicate on questions arising between parties notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument to be executed under the direction of the court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: Provided always, that if the court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed (sec. 51).

Proviso.

This section applies to those cases wherein you have some of the parties interested in the question in every point of view.ⁿ But it does not render the decision binding on the absent parties, as the 42nd section does when notice of the decision has been served under the 8th rule.^o

^m 1 Drew. 684; 22 Law Jour. 1022.

ⁿ Per V. C., in *Swallow v. Binns*, *supra*.

^o *Doody v. Higgins*, 9 Hare, Append. 32.

Upon any suit in court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties, who according to the present practice of the said court would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the clerk of records and writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any general order of the lord chancellor, to apply to the court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; provided also, that if any party so served shall be under any disability other than coverture, such

CHAP. III.

In case of
abatement,
etc. of suit,
an order may
be made,
which shall
have same
effect as a
bill of re-
vivor.

CHAP. III. order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any general order of the lord chancellor in that behalf (sec. 52).

This is one among the many other sections for avoiding delay and expense, and will be found exceedingly beneficial to the suitor.^p See Ord. 43, 7th August, 1852, 1st set, and 32 Con. Ord. r. 1, which limits the time wherein parties must apply to discharge the order referred to in this section. Where a sole plaintiff had died after a partial performance of the decree, a common order to revive was made under this section (52), leaving it to the representative, by petition or motion, to carry out the decree.^q And where, in an administration suit, there was an application under the above-mentioned section for an order to revive against the executors of a deceased defendant, the master of the rolls allowed the application, and directed them to admit assets, and in default of their so doing, an account to be taken; thus overruling his own decision in the *Dean and Chapter of Ely v. Edwards*.^r

Upon the marriage also of an infant plaintiff, after the decree the trustees of the settlement were brought before the court by a supplemental order; it being held to be a change or transmission of interest within the spirit of the Act, to warrant an order against the trustees to the effect of the usual supplemental order.^s

When however more than the common order to revive

^p *Jones v. Wood*, 20 Law Times, 50; *Martin v. Hadlow*, *ibid.* 59; *Yate v. Leithead*, *ibid.*; *Wilding v. Richards*, *ibid.* 60; *Atkinson v. Parker*, *ibid.* 106; *Lowes v. Lowes*, *ibid.* 61.

^q *Morritt v. Walton*, 2 Week. Rep. 544.

^r 22 Law Journ. 629; *Edwards v. Batley*, 2 Week. Rep. 634; 23 Law Times, 241.

^s *Atkinson v. Parker*, 16 Jur. 1005; 22 Law Jour. 20; Week. Rep. 43.

or the usual supplemental decree is required, a supplemental bill must still be filed.^t CHAP. III.

If an order to revive only be necessary, and not an order to the effect of a supplemental decree, the motion is of course, and need not be mentioned to the court.^u

Where the defendant, against whom the order to revive has been obtained under the 52nd section, was out of the jurisdiction, but had left with his solicitor a full power of attorney, substituted service of the order to revive upon his solicitor was ordered, and no appearance having been entered in pursuance of it, the court gave the plaintiff leave to enter an appearance for him under the 29th Ord., May, 1845.^v But it has since been decided that there is no necessity for the plaintiff to enter an appearance for the defendant at all, the suit being considered as standing revived upon service of the order to revive.^w

Where the sole plaintiff to a suit had died, and numerous defendants had appeared by their solicitors, which circumstance rendered it difficult and expensive to serve them personally, an order to revive, authorizing service upon the solicitors, was allowed by the court.^x

^t *Yate v. Leithead*, 16 Jur. 964; *Martin v. Hadlow*, *ibid.* 964; 22 Law Jour. 9; 9 Hare, Append. 52.

^u *Bonfil v. Purchas*, *ibid.*; 16 Jur. 965.

^v *Forster v. Menzies*, Week. Rep. 344; 17 Jur. 657; *vide* also *Cross v. Thomas*, *ibid.* 336.

^w *Ward v. Cartwright*, *ibid.* 781; 10 Hare, Append. 36; Week. Rep. 520.

^x *Morritt v. Walton*, 2 Week. Rep. 643.

CHAPTER IV.

OF THE SEVERAL KINDS OF BILLS.

Divisions of
bills.

WE shall enter upon this part of the subject by observing the divisions laid down by most writers on equity, and which are considered as threefold,—I. ORIGINAL BILLS; II. BILLS NOT ORIGINAL; and, III. BILLS IN THE NATURE OF ORIGINAL BILLS.

I. ORIGINAL BILLS are divided into bills praying relief and those not praying relief.

Original bills
praying re-
lief;

Original bills *praying relief* are divided into,—1. Such as pray the decree of the court touching some right claimed by the plaintiff in opposition to the defendant; 2. A bill of interpleader; 3. A certiorari bill.

not praying
relief.

Original bills *not praying relief* are,—1. A bill for discovery; 2. A bill to perpetuate the testimony of witnesses.

The form of every bill bears a resemblance to the original bill, although they must necessarily vary according to the purposes for which they are framed.^a

Original bills are so called because they relate to a subject-matter which has not been before controverted in the court between the same parties, standing in the same interests. All the others are generally deducible from, or are in some manner connected with them.

^a Mitf. 47.

2. *A bill of interpleader*, on which we have made some CHAP. IV
 previous remarks, is where the plaintiff, not having any Inter-
pleader.
 interest in the subject-matter of litigation, but of which he is possessed, fears he may suffer injury by two or more persons claiming the same thing by different interests. The bill prays that the rival parties may interplead or contest their doubtful claims, that the court may decide to whom the thing belongs, and that the plaintiff may be indemnified. An affidavit denying collusion between the plaintiff and any of the interpleading parties must be affixed to the bill, because the principal object of the plaintiff is, or ought to be, to avoid involving himself in difficulties, which might arise by delivering over the subject of contention to the party not entitled to it, or being vexed with a multiplicity of actions brought against him by the other claimants. If the plaintiff be in possession of any sum of money which forms the subject of the suit he must bring it into court, or offer to do so by the bill.^b

3. *A bill of certiorari* is exhibited when a suit is com- Certiorari.
 menced in an inferior court of equity, and the defendant to such suit is apprehensive that he cannot have complete justice by reason of the limited jurisdiction of that court, or that the court itself has no jurisdiction. Formerly, many applications were made by poor suitors and strangers, on the ground that the proceedings in the inferior court of common-law jurisdiction were likely to be distorted into oppression by reason of the plaintiff's destitution or poverty, and the wealth of their opponents influencing or intimidating both judge and jury, maintenance or champetry, or combination and confederacy of the defendants: a relic of the latter ground of application was, until the 15 & 16 Vict. c. 86, retained in almost every hostile bill in Chancery.^c The bill is nominated

^b Coop. 50 ; *Meux v. Bell*, 6 Sim. 175.

^c Spence, Eq. Juris. 686-690.

CHAP. IV. after the special writ which it prays, *i. e.* the writ of *certiorari* to remove the cause from an inferior court of equitable jurisdiction into the Court of Chancery. Unlike the generality of bills under the old practice, it did not pray that the defendant might answer or appear to the bill, therefore it did not ask that a subpoena might issue. Should the court see fit to remove the cause from the inferior court within its own immediate jurisdiction, the bill which is filed in the latter court is considered as an original bill in Chancery, and process is issued thereon as such.

Partition.

A bill of partition is an original bill, and is filed for the purpose of obtaining the judgment of the court as to the rights of the several parties, and the proportions to which they are entitled; and also for the sake of procuring a division of such proportions. The costs of the commission are borne by the several parties to the suit in proportion to the value of their respective interests.

Foreclosure.

A bill of foreclosure is also an original bill, which is filed by a mortgagee when the deed does not contain a power of sale: its object is to obtain the direction of the court for payment of the principal and interest due to the mortgagee, and in default thereof that the mortgagor may be foreclosed from his equity of redemption.

Bills not
praying
relief:—

We shall now speak of original bills *not praying relief*; which are divided into—1. Bills of discovery; 2. Bills to perpetuate the testimony of witnesses.

Discovery;

1. When a bill is filed for the mere purpose of discovering deeds, papers, or any documents whatever in the power or custody of the defendant, or of any facts resting within his own knowledge, either for the sake of enabling the plaintiff to sue or defend an action at law or any other purpose of a similar nature, without seeking relief in consequence, it is emphatically styled *a bill*

of discovery, as contradistinguished from all other bills which are exhibited not merely for the purpose of discovery but also for relief. CHAP. IV.

A bill of this nature must state the interest of both the plaintiff and defendant, and the matter concerning which a discovery is sought, together with the right of the plaintiff to call for the discovery.^d

If the bill seek for a discovery of accounts which are in the custody of the defendant, it is usual for the defendant to annex them to his answer by means of a schedule, so that it may be taken as part of the answer: but if a book be scheduled to an answer, part only of which relates to the matters connected with the suit and part whereof does not, the defendant, to obtain the protection of the court, should in his answer, which is put in upon oath, state what part of the book is irrelevant to the matters in question, and crave leave that such part may be sealed up, which will be allowed accordingly. Such documents as compose the schedule to an answer are usually lodged with the clerk of the records and writs for the plaintiff's inspection, unless where the court sometimes, for the sake of convenience, will order them to remain with the defendant's solicitor, and allow inspection there or in some room appointed for the purpose. Accounts.

The defendant to a bill of discovery is entitled to the costs as between solicitor and client,* unless (according to the opinion of Mr. Justice Buller, who considers the rule too broadly stated) he refuses upon proper application to discover that which the plaintiff is justly entitled Defendant in discovery entitled to costs.

^d Mitf.

* So stated by Maddock (Ch. Pr. 1, 216), who refers his readers to *Cartwright v. Hatley*, 1 Ves. jun. 293. But, on reference to that case, and that part of the Chancellor's judgment from which the learned writer obtained his law upon the subject, it by no means appears to carry out the proposition as a general rule, nor can it be relied upon as strictly true. His Lordship's words are merely as

CHAP. IV. — to know, and who, in consequence of the defendant's refusal, is driven to file a bill for that purpose. In any other case the plaintiff must pay not only the costs of the answer, but all costs occasioned by opposing motions made by the plaintiff during the progress of the cause, as in the case of *Noble v. Garland*,^e where there had been a motion to stay trial, a motion for a commission to examine witnesses abroad, a motion that the defendant might bring into court all books, papers, etc.

Where a bill of discovery is filed in aid of an action at law, no person can be made a party in equity who is not a party to the record at law.^f But since the common-law courts have allowed parties in an action to be examined as witnesses in the cause, bills of discovery in the Court of Chancery in aid of action at law are of less frequent occurrence.

The defendant cannot move to dismiss a bill of discovery for want of prosecution : for the cause ends with the answer :^g but he may, upon his answer being deemed sufficient, move as of course for his costs in the suit.

Bill in *perpetuam memoriam rei*.

2. *A bill to perpetuate the testimony of witnesses*, or to examine witnesses *de bene esse*, is exhibited when, from age or the dangerous state of health of one or the only witnesses to a particular fact, or when they are about going abroad, their testimony is in danger of being lost.

5 & 6 Vict. c. 69.

The 5 & 6 Vict. c. 69, provides that, where any person follow :—"They have brought a bill against a witness, and, as he has answered, I cannot deliver him from answering fully ; but he must have his expenses for being brought here ; and I *think* it ought to be as between attorney and client." The general rule of practice however seems to be for a defendant to have only his costs as between party and party.

^e 1 Madd. Rep. 344.

^f *Queen of Spain v. Glyn*, 7 Cl. and Fin. 483 ; *Irving v. Thompson*, 9 Sim. 17.

^g 1 Madd. Pr. 218 ; 2 Bro. C. C. 10.

claims to be entitled upon the happening of any future event to any honour, title, dignity, or office, or to any estate or interest in any property real or personal, the right or claim to which cannot be tried before the happening of such event, such person may file a bill in Chancery to perpetuate any testimony material to establish such claim or right.

If the witnesses are above the age of seventy years, application is made by a petition or motion, of course, for an order to examine them *de bene esse*, upon an affidavit of the fact, and that their evidence is material.^h When the matter was of great importance, and the thing of which evidence was sought lay in the knowledge of that witness only, he was ordered to be examined *de bene esse*, although he was not proved to be old or infirm.ⁱ

As the examination *de bene esse* is only allowed in cases of emergency, or where important testimony is in danger of being lost, if the witnesses should survive, and are in the kingdom at the time of the examination-in-chief, they must be re-examined, and the depositions will be suppressed.

The bill to perpetuate the testimony of witnesses must state the matter on which the plaintiff requires evidence, his interest in the subject, and pray that he may have leave to examine the witnesses thereon, to the end that their testimony may be preserved and perpetuated,^j and that, before the facts can be investigated in a court of law, the testimony of a material witness is in danger of being lost, by his death or departure from the realm: and, as this process tends to change the jurisdiction of a party from a court of law to a court of equity, an affidavit of the circumstances should be annexed.

^h Pritchard v. Gee, 5 Madd. 364.

ⁱ Shirley v. Earl Ferrers, 3 P. W. 77.

^j Mitf. 51.

CHAP. IV.

Bills not
original.

II. BILLS NOT ORIGINAL, or, in other words, such as are an addition to, or continuation of an original bill, are divided into—1. A supplemental bill; 2. A bill of revivor; and 3. A bill of revivor and supplement.

Supple-
mental bill.

1. *A supplemental bill* is used to supply the defects of a suit when the imperfection arises from a defect in the original bill, or in some of the proceedings upon it, or in respect of the discovery of new evidence. A supplemental bill is filed when a further discovery is sought from the defendant to put new matter in issue, or to add parties, provided the suit has proceeded so far that the original bill cannot be amended for that purpose. It may be filed even after a decree. But a supplemental bill will not be allowed where an amendment would answer the same purpose, which the court (subject to certain restrictions) will allow the plaintiff to make—where new facts are brought to light, either by the diligence of the parties, or the disclosures made in the defendant's answer. And the reason is that technically an amendment was considered as forming part of the original bill, and spoke from the date of filing the original bill.^k

Supple-
mental bill,
as to imma-
terial facts.

If a supplemental bill be filed in respect of facts posterior to the original bill, but which are immaterial as facts, or irrelevant to the subject of the suit, a demurrer will hold. They must also be of such a nature, that the relief sought for cannot be obtained under the original bill.^l

When fresh
party added
to the
record.

When, in a supplemental bill, a new party is introduced, the proceedings against such subsequently introduced party have in some degree the effect of an original bill. If a supplemental bill be irregularly filed, the defendant ought, if the objection appear upon the face of

^k Robinson v. Hewitson, 20 Law Times, 154.

^l Milner v. Lord Harwood, 17 Ves. 144; Adams v. Dowding, 2 Madd. 63.

the bill, to demur; but if the objection be not so apparent, then to move that such bill be taken off the file.^m CHAP. IV.

A supplemental bill must set forth the original bill, and proceedings thereon, and, if occasioned by an event subsequent to the filing of the original bill, it must also state that circumstance: it is not however necessary for the plaintiff to state in his supplemental bill all the circumstances of the case at length; but it will be sufficient if he set out so much of the case as shows that there was an equity.ⁿ And, by the 49th of the New Orders in Chancery, issued the 26th day of August, 1841, and 32 Cons. Ord. r. 3, it is not necessary, in any bill of revivor or supplement, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it. A supplemental bill prays that all the defendants may appear and answer the charges therein contained; but where the supplemental bill is exhibited merely for the purpose of bringing formal parties as defendants before the court, it is not necessary to make the defendants to the original bill parties to the supplemental bill. But by the 53rd section of 15 & 16 Vict. c. 86, it is enacted that,—It shall not be necessary to exhibit any supplemental bill in the said court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defen-

Contents of
supple-
mental bill.

New facts,
etc., after
commence-
ment of suit,
to be intro-
duced as
amendments
to bill, etc.

^m *Ranger v. Great Western Railway Company*, 7 Jur. 935.

ⁿ *Vigers v. Lord Audley*, 9 Sim. 77.

CHAP. IV. dant leave and opportunity of answering and meeting the same as shall in that behalf be prescribed by any general order of the lord chancellor.

But, notwithstanding, the above section of the Act was intended, and certainly has the effect of, affording greater latitude to parties to save themselves the expense and delay of filing supplemental bills, by simple amendment, in the generality of cases before the court; yet the former practice is by no means rendered obsolete; for there are still cases in which a supplemental bill is considered necessary. (*Vide* Appendix C, *Revivor* and *Supplement*.)

Revivor.

2. *A bill of revivor* is a continuation of proceedings where a suit abates by the death of a party whose interest in the subject-matter of the suit does not determine by his death, but is transmitted to his real or personal representative, according to the nature of the property upon which the question arises, and the title of the representative cannot be disputed. As the interest of a plaintiff generally extends to the whole suit, all proceedings, except where plaintiffs are joint tenants, abate by the death of a plaintiff, or marriage of a female *plaintiff*; but, although by the death of a defendant the suit abates so far as his interest is concerned, the marriage of a female *defendant* is no abatement.^o On the marriage of a female plaintiff, the person of her husband is all that is required to be ascertained. The bill of revivor must, like a supplemental bill, subject however to the 49th of the last-mentioned New Orders and 32 Cons. Ord., state the original bill, the subsequent proceedings thereon, and also the abatement. The title to revive must clearly appear. The bill must also charge that the cause ought to stand revived, and be placed in the same condition, as to the parties thereto, as it stood with respect to the parties to the original bill at the time of abatement,^p praying

^o 2 Eq. Ca. Ab. 1.

^p Mitf. 76.

that the suit may be revived accordingly. But see 52nd CHAP. IV. section, 15 & 16 Vict. c. 86, *supra*, and also Appendix C.

It appears that a suit does not abate by the death or outlawry or lunacy of a relator; but, in such an event, the court will suspend further proceedings until another relator be appointed: neither in a creditor's suit do the proceedings abate by the death of a plaintiff.^a

No abatement in case of an information.

When the rights of the parties are clearly ascertained by a decree, both plaintiffs and defendants are equally entitled to the benefit of the decree; therefore, where, in case of an abatement after a decree, the plaintiffs neglect to revive, it is competent for any of the defendants to file his bill of revivor, to bring the necessary parties before the court. The death of a sole plaintiff abates the suit. If he die before the decree, and his representatives do not revive, the defendant will not be allowed to revive for his costs; and in this respect he will be remediless.^r

Decree provides for the rights of all parties to the suit.

If one of two joint tenants die after the commencement of the suit, this is no abatement of the suit,^s because the interest of the one so dying survives to the other; so if one release, it will not abate the suit as to the other: neither does the death of the plaintiff in an interpleader suit after decree abate the proceedings; for the decree determines his interests, and each of the defendants is considered in the character of plaintiff.

No abatement in the case of joint tenants.

Where a suit abates by the death of a sole plaintiff, the court, upon motion of any defendant made, on notice served on the legal representative of the deceased plaintiff, may order such legal representative to revive the suit within a limited time, or that the bill be dismissed.^t The creditors of a bankrupt or insolvent may have the same remedy against the assignees; for, although the bank-

When suit abates by death of a sole plaintiff.

^a 2 Madd. Ch. Prac.

^r *Andrews v. Lockwood*, 10 Jur. 277.

^s 2 Freem. 6.

^t 32 Con. Ord. r. 4.

CHAP. IV. ruptcy or insolvency of either a plaintiff or defendant does not cause an abatement, yet the suit is so far defective, that it cannot be proceeded with until the assignees are brought before the court.

A defendant, or his representative, may in all cases revive, where he or they can derive a benefit from the ulterior proceedings.^u The 52nd section of 15. & 16 Vict. c. 86, *supra*, without abolishing the old practice, has considerably extended the rights of parties to expedite proceedings in cases where a bill of revivor was deemed to be necessary. See also section 44, *supra*. But it would seem that the benefit of this section (44) is only intended to assist parties to a suit where, owing to insolvency or some such cause, there is a difficulty in obtaining representation to a deceased person interested in the matters in question in the suit; as in the case of *Long v. Storie*,^v which was a foreclosure suit giving several persons a right to redeem within a certain period. Before the time arrived, one of the number had died, and some difficulty having arisen in the ecclesiastical court about obtaining administration to the deceased, one of the creditors took out letters of administration; but before proceedings were perfected, another creditor entered a caveat. Notwithstanding these circumstances, the court allowed the former creditor, who had almost obtained representation, to represent the estate of the deceased for the purposes of the suit.^w In a case, also, where the deceased was tenant for life of tithes, and who had died intestate, and there being no personal representative, his widow, by the concurrence of several judges of the court, was ordered to appear and represent her deceased husband's estate and effects, for all the purposes of the suit.^x

^u 2 Madd. Ch. Prac.

^w See also 23 Law Jour. 200.

^v 1 Kay, Append. 12.

^x Dean and Chapter of Ely *v.* Edwards, 10 Hare, Append. 65; 17 Jur. 219.

Under some circumstances, where there is a contest in the ecclesiastical court as to probate, the Court of Chancery has, upon motion, appointed the executor named in the will to represent the deceased for all purposes of the suit.^y But this does not apply to a case where the personal representative of a deceased trustee has active duties to perform in the execution of the trusts, or in any decree which the court might make.^z

III. Bills in the nature of original bills are,—1. A cross bill; 2. A bill of review; 3. A bill in the nature of a bill of review; 4. A bill to impeach a decree for fraud; 5. A bill to suspend the execution of a decree; 6. A bill to carry a decree into execution; 7. A bill in the nature of a bill of revivor; and 8. A bill in the nature of a supplemental bill.

Division of
bills in the
nature of
original bills.

1. *A cross bill* is that which is exhibited by a defendant in a suit against the plaintiff, or other parties, touching some matter in litigation in that suit, either to obtain a discovery or full relief to all parties; for, as a defendant could not in equity examine a plaintiff as a witness, he might only obtain his testimony by filing a cross bill against him.^a A cross bill being considered as a defence, or a proceeding for the purpose of obtaining a complete determination of a suit already pending in court, and the plaintiff to the cross bill being already drawn into court, as defendant to the original suit, he may avail himself of the assistance of the court, without being bound to show any ground of equity to maintain its jurisdiction.^b

Cross bill.

When any question arises between two or more defendants so that a complete decree cannot be made unless a cross bill be filed, it is necessary for one or more of the defendants to the original cause to proceed against the

^y *Hele v. Bexley*, 15 Beav. 340.

^z *Fowler v. Bayldon*, 9 Hare, Append. 78.

^a 1 P. Wms. 595.

^b Mitf. 81.

CHAP. IV. plaintiff and the rest of the defendants, or against as many of them as shall be deemed proper parties in a cross suit, to bring the disputed point before the court.

In certain cases defendant, after answer, may file interrogatories for examination of plaintiff.

The 19th section of the 15 & 16 Vict. c. 86, will greatly lessen the necessity for cross bills. Although cases may still arise in which, for the sake of having full justice, the defendant must resort to the old practice; as for example, where the defendant requires the production of documents in the possession of a co-defendant, a cross bill must be filed.^c By the above section it shall be lawful for any defendant in any suit, whether commenced by bill or by claim, but in suits commenced by bill which the defendant is required to answer, not until after he shall have put in a sufficient answer to the bill, and without filing any cross bill of discovery, to file in the record office of the said court interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories, in like manner as if the same had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same day duly appeared; and the practice of the court with reference to excepting to answers for insufficiency, or for scandal, shall extend and be applicable to answers put in to such interrogatories; provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the court is to have regard, in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the

^c Attorney-General v. Clapham, 10 Hare, Append. 45.

plaintiff, and in suits commenced by claim, to the statements therein, and in any affidavits which may have been filed either in support thereof or in opposition thereto: provided also, that a defendant, if he shall think fit so to do, may exhibit a cross bill of discovery against the plaintiff, instead of filing interrogatories for his examination.

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Defendant may exhibit a cross bill instead of filing interrogatories.

In all cases where a cross bill is filed, the plaintiff to the former suit is entitled to an answer to his bill before he can be called upon to put in his answer to the cross suit; for this purpose he must move for an order to stay proceedings therein, until the answer has been filed to the original bill.^d But if the plaintiff amend his original bill, subsequently to the cross bill being filed, he waives his priority, provided the amendments be such as require an answer.^e

Plaintiff in former suit entitled to priority.

When a suit already pending is insufficient to exhibit the rights of all the parties, together with every matter essential to the full determination of the question in dispute; if such determination be necessary to a complete decree, the court will order a cross bill to be filed for this purpose.^f

The answer to a cross bill filed for discovery cannot be taken, and made to form part of the original answer; but the defendants to the original bill, having obtained the discovery, should move for leave to file a supplemental answer.^g

Where a defendant in equity files a cross bill for discovery only against the plaintiff in equity, the answer thereto may be read and used by the party filing such cross bill, in the same manner as the answer to a bill praying relief may now be read and used.^h

^d Noel v. King, 2 Madd. 392.

^e Long v. Burton, 2 Atk. 218.

^f Mitf. 83.

^g The Warden and Minor Canons of St. Paul's v. Kettle, Vea. and B. 16.

^h 42 Ord., 26th Aug. 1841, and 19 Con. Or. r. 6.

CHAP. IV. It is usual to bring on the original and the cross cause for hearing at one and the same time ; and, for this purpose, the plaintiff to the cross bill is allowed, upon motion or petition, as of course, to have his cause advanced so as to be heard with the original suit ; but he must set his cause down in the same court in which the original cause is set down.

Bill of
review.

2. If, after a decree has been *signed* and *enrolled*, a party is not satisfied therewith, but seeks to reverse it, he must file his *bill of review*, which can only be done upon two grounds,—1. Where an error in *law* is apparent in the body of the decree ; 2. Upon the discovery of any new matter or *fact* since the decree, and which could not have been used when the decree was made.ⁱ

Petition of
re-hearing.

If the decree has not been signed and enrolled, and there is error apparent therein, the party impugning it may present his *petition of re-hearing* ; but if the decree be sought to be reversed on new facts, previous to its being signed and enrolled, he must proceed by means of a *supplemental bill* in the nature of a bill of review, which is filed for the purpose of supplying the defect which caused the error in the decree upon the former bill.

If a bill of review seek to reverse a decree upon error apparent therein, it is not necessary to obtain leave of the court for that purpose ; but where a party seeks to reverse the decree upon new facts, subsequent to publication, leave of the court must first be obtained ; and, therefore, in filing a bill of this nature, wherein is stated the former bill and the proceedings thereon, the decree, the point of grievance, and the matter discovered, it is also necessary to state the leave of the court to exhibit the same.*^j But a supplemental bill, filed for the purpose of

ⁱ Beame's Ord. 2 ; *Hungate v. Gascoigne*, 15 Law Jour. N. S. Ch. 142.

^j 1 Vern. 292.

* Bills of review are seldom resorted to of late years, owing to the

carrying out a decree, does not require any averment that the matter contained in such bill had been discovered since publication, or since the original decree was pronounced. A supplemental bill, in aid of a decree, cannot vary the principle of the decree, but takes that as its basis, supplying any omissions in the decree to enable the court to give full effect to its decision; as in a decree for an account, where the supplemental bill is filed for the want of full directions given in the decree before.^k

After the expiration of twenty years from the date of the decree which has been signed and enrolled, a bill of review will not be allowed,^l unless where the parties labour under disabilities.^m

It seems to be necessary to entitle a person to file his bill of review that he should have performed the decree in the former bill; or he must show his inability to do so.

3. *A bill in the nature of a bill of review* is brought in consequence of error in the decree, where it is pronounced against a party who has no interest in the subject of litigation, or such a degree of interest as was not sufficient to render the decree against him binding on some other person claiming the same interest.ⁿ

A bill in the nature of a bill of review.

4. *A bill to impeach a decree which has been obtained by fraud* is an original bill; and, as the fraud made use of for procuring the decree is the principal object to be shown, which can only be done by evidence, it is not necessary for that purpose to obtain leave of the court: and it is of no consequence that the decree was by consent of the parties impeaching it, provided such consent was obtained by fraud. A decree improperly obtained against

Decree obtained by fraud.

circumstance that decrees are seldom enrolled. *Vide* Truelock v. Roby, 11 Jur. 601, *n*.

^k Hodson v. Bull, Dec. 22, 1842, C. C.

^l Mitf. 88.

^m 2 Madd. Ch. Pr.

ⁿ Mitf. 92.

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To suspend
the opera-
tion of
decrees.

5. *A bill to suspend the operation of decrees* on special circumstances, or to avoid them on the subsequent discovery of new matter, being only had recourse to in cases of urgent necessity, is of course but little used, and forms no precedent for matters of an ordinary nature; it is, therefore, only mentioned in this place for the sake of order.

To carry a
decree into
execution.

6. *A bill to carry a decree into execution* is brought in cases where the parties have neglected to obey the decree, whereby their various rights under it have fallen into such confusion and embarrassment by subsequent events as to render it impossible to carry the decree into execution, without the further aid of the court to ascertain them.

In the
nature of
a bill of
revivor.

7. *A bill in the nature of a bill of revivor* is exhibited where the interest of a party dying is transmitted to another in such a manner as may be made the subject of litigation in a court of equity: as in the case of a party to the suit devising his real estate the devisee will be entitled to the former suit; yet, for the want of privity of title between the deceased party and the devisee, which would have enabled the proceedings to continue by a bill of revivor, it is necessary to proceed with the suit by an original bill in the nature of a bill of revivor.

Original, in
the nature of
supple-
mental bill.

8. Also, if the interest of a party to a bill determine pending the suit, and the property is vested in another who does not claim under him, the suit cannot proceed by a bill of revivor, neither can a supplemental bill supply what is wanting; but the benefit of the former proceedings must be obtained by *an original bill in the nature of a supplemental bill*.

CHAPTER V.

LIS PENDENS.—OLD FORM OF PROCEEDING BY SUBPŒNA.

—NEW SERVICE BY PRINTED COPY OF BILL.

UNTIL the passing of the 2 & 3 Vict. c. 11, as soon as a bill was filed it was considered as being, to all intents and purposes whatever, notice to all the world, and was technically denominated a *lis pendens*. If, therefore, a purchaser, however innocently, bought an estate which had become the subject of litigation in this court by means of a bill which had been put upon the file even the very day before the purchase, such purchaser was made a party to the record, and instantly became involved in all the consequences of the suit in respect of his interest in such estate, and became also subject to the decree, as if the suit had been originally instituted against him. To remedy so glaring an evil, and to protect *bonâ fide* purchasers from being taken by surprise, the above statute was passed, which (sec. 7) declares that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or

Lis pendens,
effect of.

2 & 3 Vict.
c. 11, s. 7.

CHAP. V. information was filed, shall be left with the senior master of the Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence: and the same statute, in a previous section (sec. 4) having provided that all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, should, after the expiration of five years from the date or entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance be again left with the senior master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right, title, estate, or interest, in or to any such purchaser or mortgagee for valuable consideration, or as to any creditors within five years before the right of such creditors accrued; and so, *toties quoties*, at the expiration of every succeeding five years, goes on, in the said 7th section, to declare that the provisions thereinbefore contained in regard to the *re-entering* of judgments every five years, and the fee payable thereon (one shilling) shall extend to every case of *lis pendens* which shall be registered under the provisions of this Act (*vide supra*, p. 295, 15 & 16 Vict. c. 86, s. 46).

Judgments
or decrees to
be renewed
every five
years in the
Common
Pleas.

Subpœna;

As soon as the bill was filed, the next step for the plaintiff to take, before the passing of the 15 & 16 Vict. c. 86, was to compel the defendant's appearance and answer by serving him with a subpœna, which was prayed for in the bill. The subpœna was a writ issuing out of

and under the seal of the Court of Chancery, commanding the defendant to appear within eight days under certain pains and penalties therein specified.

As the rules relating to the service of the printed bill under the new system are similar to the service of the subpoena to appear under the old, it may be advisable to state briefly something respecting the former process.

Previously to issuing a subpoena, under the old practice it was necessary that a bill should be filed, for until the bill was on the file there was no cause existing to which the defendant could appear; but in cases of injunction, if the bill had been filed on the return-day of the subpoena, it was sufficient. not issued until bill filed.

By an Order 21st December, 1833, every subpoena, Subpoena. other than a *subpoena duces tecum*, must contain three names where necessary or required. A husband and wife were reckoned as *one* unless the separate estate of the wife were sought to be charged, in which case it was necessary for her to be separately served.^a

If the defendant had appeared and put in his answer, and the plaintiff amended his bill, he had to issue a fresh subpoena;^b but if the defendant appeared and before answer the plaintiff amended his bill, a fresh subpoena was not necessary, neither was the plaintiff required to serve the defendant with a further subpoena where a demurrer or plea had been overruled.

Formerly the labels only were required to be served on each defendant personally, and the body under seal shown to them at the time of such service; but the body itself might always have been served personally, or left at the house of the other person, according to the convenience of the plaintiff.^c Afterwards it was ordered that the service of subpoenas should be effected by delivering a copy Labels of subpoena used to be personally served.

^a 2 Madd. Ch. Pr.

^b Skeffington v. —, 4 Ves. 66.

^c Beam. Ord. 171.

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Service at dwelling-house now sufficient.

of the writ and of the indorsement thereon, and at the same time producing the original writ: or, if it were not served personally, it was sufficient to leave a copy of such subpœna at the party's dwelling-house, producing the original writ to the person with whom such copy was so left.^d

When bill amended service on defendant's solicitor.

Service of a subpœna upon a defendant's solicitor, to answer an amended bill or to hear judgment, was, and the latter is, to be deemed good service upon the party.^e

Service on a peer.

Where the defendant claims the privilege of peerage, a petition must be presented to the secretary of the lord chancellor, praying for a letter missive returnable immediately; a copy of which, together with a printed copy of the bill and a copy of the petition, are then served on the peer, either personally or at his place of abode: this service will be followed up by a sequestration, unless he enter his appearance within eight days.

4 & 5 Will. IV. c. 82, s. 2.

By 4 & 5 Will. IV. c. 82, s. 2, where it is made to appear to the satisfaction of the court, in any such suit as therein mentioned,* that the defendant cannot be served in consequence of his secreting or withdrawing himself with the view to avoid such service, the court might order that the service of the subpœna should be substituted in such manner as it might direct.

Before the passing of the 8 Vict. c. 16 (the "Companies Clauses Consolidation Act," 1845), if the suit were against a corporation, the subpœna might be served upon any of its members; but by section 135 of that Act it is provided, that any proceedings at law or in equity requiring

^d Ord. 21st Dec. 1833.

^e Ord. 26, 8th May, 1845, and 28 Con. Or. r. 7.

* *i.e.* Suits concerning any lands, tenements, or hereditaments, in England, Wales, or Ireland, or any charge, lien, judgment, or encumbrance thereon, or concerning any money vested in any government or other public stock, or public shares in public companies or concerns, or concerning the dividends or produce thereof.

to be served upon the company, may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company. By the "Railway Clauses Consolidation Act," 1845, 8 Vict. c. 20, s. 138, a similar provision is made for the service of process upon railway companies. By the "Lands Clauses Consolidation Act," 1845, 8 Vict. c. 18, a like provision is made by sec. 134 for the service of process upon the promoters of any works or undertaking which shall by any Act to be thereafter passed, be authorized to be executed; in which case the process may be served by being left at or transmitted through the post directed to the principal office of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given or transmitted through the post directed to the secretary, or in case there be no secretary, the solicitor of the said promoters. By the 17 & 18 Vict. c. 25 ("An Act to amend the Industrial and Provident Societies Act," 1852), service may be effected by leaving the same at the head office for the time being of the society; or in case he shall not be found or known, then service on any agent or officer employed by the said society, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient notice of the same respectively on such society.

It has been the practice of the court under peculiar circumstances to allow of what is called substituted service, or, in other words, to admit of a subpoena to appear to be made upon some person other than the defendant, where it has been found inconvenient or impossible to serve the defendant himself; but in all cases of substituted service the court seems to have been guided by the fact of an actual

CHAP. V. or presumed agency involving a fair inference that some communication existed between the defendant and the party upon whom service of process was directed to be made;^f for where there was no sufficient proof to show agency on the part of the attorney, an application to substitute service upon him was refused, notwithstanding he had recently acted as the attorney and solicitor of the defendant in certain proceedings both at law and in equity, to avoid the consequences of which the defendant had absconded, and was then living out of the jurisdiction.^g

Subpœna on
Sunday.

A subpœna served on a Sunday was irregular, and any proceedings founded on such service might have been set aside for irregularity.^h

We now come to the more recent practice which has been adopted under the 15 & 16 Vict. c. 86, through the recommendation of the chancery commissioners. Section 2 abolishes the writ of subpœna to appear to and answer a bill of complaint. And by section 3, in lieu of serving the defendant with a writ of subpœna to appear to and answer a bill of complaint, the defendant shall be served with a printed bill of complaint, with an indorsement thereon in the form or to the effect set out in the schedule to the Act, with such variations as circumstances may require, the same being previous to service duly stamped by one of the clerks of the records and writs. Section 4 directs that the filing of a printed bill of complaint shall have the same effect as the filing of a bill of complaint in court and the issuing of a writ of subpœna now has, and the service

^f *Hibernian Mining Company*, 1 Sch. and Lef. 239; *Bromley v. Bank of England*, 7 Jur. 120; *Thomas v. Selby*, 15 Law Jour. 280; *Murray v. Vipart*, 14 Law Jour. 217; *Hobhouse v. Courtney*, 12 Sim. 140; *Hornby v. Holmes*, 4 Hare, 306; 9 Jur. 225, 796; *Hunt v. Lever*, 5 Ves. 147; *Kinder v. Forbes*, 2 Beav. 503; *Pulteney v. Shelton*, 5 Ves. 147; *Lane v. Hardwicke*, 5 Beav. 222.

^g *Cope v. Russell*, 16 Law Jour. 369; 11 Jur. 463.

^h 19 Ves. 367.

of a printed bill so filed, upon the defendant with such indorsement thereon so stamped as aforesaid shall have the same effect as the service on him of a writ of subpoena now has, and shall entitle the plaintiff to such remedies for default of appearance and otherwise as he is now entitled to in case of due and proper service of a subpoena, to appear to and answer a bill of complaint. The service upon a defendant of a printed copy of a bill of complaint shall be effected in the same manner as the service of a writ of subpoena to appear to and answer a bill of complaint is now effected, save only that it shall not be necessary to produce the original bill which will be on the files of the court: provided that the court shall be at liberty to direct substituted service of such printed bill, in such cases and in such manner as it shall think fit (sec. 5).

Notwithstanding the provisions herein-before contained, the clerks of records and writs of the said court may receive and file a written copy of any bill of complaint praying a writ of injunction or a writ of *ne exeat regno*, or filed for the purpose either solely or among other things of making an infant a ward of the said court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days, and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof; and a written copy of any such bill of complaint, stamped as aforesaid, and with such indorsement thereon as aforesaid, may be served on any defendant thereto, and such service shall have the same effect as the service of a printed copy (sec. 6).

Before the name of any such person shall be used in any suit to be instituted in the said court as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such autho-

Written copies of bills may be served, in certain cases, upon plaintiff undertaking to file a printed copy in fourteen days.

Person whose name is used as next friend of any infant, etc., in any suit, etc., to sign a written authority.

CHAP. V. rity shall be filed with the bill, information, or claim
(sec. 11).

This clause is intended to put a restraint upon persons filing bills on behalf of infants, married women, etc., without their consent, and which has often brought innocent parties into a scandalous scene of litigation, especially when the *prochein ami* of an infant plaintiff happened to be a pauper.

CHAPTER VI.

SERVICE OF BILL.—SUBSTITUTED SERVICE.—CON. ORDERS.—NO ATTACHMENT OR SERJEANT-AT-ARMS FOR APPEARANCE.—CONTEMPT OF COURT.—RETURN OF ATTACHMENT.—PRO CONFESSO.—FORMAL PARTIES.

By the 10th Cons. Ord. r. 1, service of every copy of a bill shall be effected by serving such copy personally or by leaving the same with a servant of the defendant or some member of his family, at his dwelling-house or usual place of abode, unless the court directs some other mode of service.

I. *In the Case of Parties generally.*

2. The court may direct substituted service of a copy of a bill to be served under the stat. 15 & 16 Vict. c. 86, in cases in which, according to the practice of the court, existing at the time of the passing of that statute, substituted service of a *subpoena* to appear to and answer a bill might have been directed (22nd May, 1661; Sanders, 297). 10 Con. Or.
Rule 2.
Substituted
service.

3. Where a defendant within the jurisdiction of the court is served with a copy of a bill in manner provided by the stat. 15 & 16 Vict. c. 86, s. 3, he must appear thereto within eight days after the service of such copy of the bill; otherwise an appearance may be entered for him, as provided by the next Rule of this Order (8th May, 1845; Ord. 16, art. 3). Rule 3.
Time for
appearance.

CHAP. VI.

Rule 4.
Where appearance may be entered by plaintiff for defendant within jurisdiction.

4. Where any defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, is, when within the jurisdiction of the court, duly served with a copy of the bill, under the stat. 15 & 16 Vict. c. 86, s. 3, and refuses or neglects to appear thereto within eight days after such service, the plaintiff may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the record and writ clerk to enter an appearance for such defendant; and, no appearance having been entered, the record and writ clerk shall enter such appearance accordingly, upon being satisfied by affidavit that the copy of the bill was duly served. And after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the record and writ clerk is not hereby required to enter such appearance, the plaintiff may apply to the court for leave to enter such appearance for such defendant; and the court, being satisfied that the copy of the bill was duly served, and that no appearance has been entered for such defendant, may, if it so thinks fit, order the same accordingly (8th May, 1845; Ord. 29).

Rule 5.
Not if defendant an infant or *non compos mentis*.

5. Any appearance entered at the instance of the plaintiff for a defendant, who, at the time of the entry thereof, is an infant or a person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity (8th May, 1845; Ord. 30).

Rule 6.
Where appearance may be entered by plaintiff for defendant absconding.

6. Where the court is satisfied by sufficient evidence that any defendant has been within the jurisdiction of the court at some time not more than two years before the bill was filed, and that such defendant is beyond the seas, or that, upon inquiry at his usual place of abode (if he had any), or at any other place or places where at the time when the bill was filed he might probably have been met with, he could not be found so as to be served with a

copy of the bill, under the stat. 15 & 16 Vict. c. 86, s. 3, and that in either case there is just ground to believe that such defendant has gone out of the realm or otherwise absconded to avoid being served with such copy of the bill or with other process, the court may order that such defendant do appear at a certain day to be named in the order; and a copy of such order, together with a notice to the effect set forth at the end of this rule, may, within fourteen days after such order made, be inserted in the 'London Gazette,' and be otherwise published as the court shall direct. And where the defendant does not appear within the time limited by such order, or within such further time as the court may appoint, there, on proof made of such publication of the said order, the court may order an appearance to be entered for the defendant on the application of the plaintiff.

Notice.—"A. B., take notice, that if you do not appear pursuant to the above order, the plaintiff may enter an appearance for you, and the court may afterwards grant to the plaintiff such relief as he may appear to be entitled to on his own showing" (8th May, 1845; Ord. 31).

7. Where a defendant in any suit is out of the jurisdiction of the court,

(1.) The court, upon application supported by such evidence as shall satisfy the court in what place or country such defendant is or may probably be found, may order that a copy of the bill, under the stat. 15 & 16 Vict. c. 86, s. 3, and, if an answer is required, a copy of the interrogatories, may be served on such defendant in such place or country or within such limits as the court shall think fit to direct.

(2.) Such order shall limit a time after such service within which such defendant is to appear to the bill; such time to depend on the place or country within which the copy of the bill is to be served.

Rule 7.
Art. (1.)
Service of
copy of bill
and of inter-
rogatories on
defendant
out of juris-
diction, and
entering
appearance
for him.

Art. (2.)

CHAP. VI.

And where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or demur, or obtain from the court further time to make his defence to the bill.

Art. (3.)

(3.) At the time when such copy of the bill shall be served, the plaintiff shall also cause such defendant to be served with a copy of the order giving the plaintiff leave to serve such copy of the bill.

Art. (4.)

(4.) And if, upon the expiration of the time for appearing, it be shown to the satisfaction of the court that such defendant was duly served with such copy of the bill and with a copy of the order, the court may, upon the application of the plaintiff, order an appearance to be entered for such defendant (8th May, 1845; Ord. 33).

Rule 8.
Affidavits of
service.

8. Affidavits filed for the purpose of proving the service of a copy of a bill upon any defendant, shall state when, where, and how the same was served, and by whom such service was effected (8th May, 1845; Ord. 34).

Rule 9.
Appearance
entered by
defendant
after appear-
ance entered
for him.

9. A defendant, notwithstanding that an appearance may have been entered for him by the plaintiff, may afterwards enter an appearance for himself in the ordinary way; but such appearance by such defendant shall not affect any proceeding duly taken or any right acquired by the plaintiff under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance (8th May, 1845; Ord. 36).

Rule 10.
Attachment,
messenger,
and serjeant-
at-arms to
compel
appearance.

*10. No attachment for want of appearance shall hereafter be issued, without a special order of the court; and no order shall be made for a messenger, or for the serjeant-at-arms, to take the body of the defendant, for the purpose of compelling him to appear to the bill (26th Aug. 1841; Ord. 7).

The writ of attachment is directed to the sheriff or other chief officer of the county or jurisdiction where the de-

fendant happens to be, commanding him to attach the defendant, and have him brought before the court at the return of the writ. CHAP. VI.

An attachment is considered as sealed from the first moment of the day on which it issues, and consequently takes precedence of an appearance which may have been entered on the same day.^a Attachment when deemed to be sealed.

An attachment sealed before the defendant is in contempt is irregular, notwithstanding it may not be executed, nor even delivered out, until after the defendant is in contempt.

Attachments are issued for non-appearance, for default in answering, for want of compliance with the orders of the court, for non-payment of money, and other acts of disobedience. Why issued.

An attachment must be made returnable at or before the last return of the term next following that on which it is tested.

Having spoken of a defendant's contempt for want of appearance, it will be sufficient to observe that contempts of court are fourfold;—1. Disobedience to the processes of the court; 2. Not obeying the orders or decrees of the court; 3. Committing acts against the dignity of the court, or against or without its authority, or abusing parties concerned in causes, or persons serving processes, or abusing the process of the court; 4. Scandalizing the court, or prejudicing the public against parties in a suit before the cause has been heard.^b But every suitor prosecuting a contempt must use all diligence to procure each process to be duly executed, and, his wilful neglect appearing to the court, the offender must pay the aggrieved party good costs, and lose the benefit of the process returned without such endeavour.^c Contempts of court; how divided.

^a Stephens v. Neal, 1 Madd. 550.

^b 1 Grant's Ch. Pr. ch. 31.

^c Ord. Chan. 112.

CHAP. VI.

The sheriff of the county into which the attachment is issued, and whose office it is to execute it against the defendant with all possible diligence, may make his return thereof in either of the three following ways, which are respectively indorsed on the writ by the under-sheriff, and signed by the sheriff.

Sheriff's
return to
writ of
attachment.

First, if the defendant abscond, or cannot be found, he returns "*Non est inventus*," whereupon the plaintiff may continue to issue attachments till the defendant is taken; but formerly, if he was unable to attach the defendant by these means, he could not obtain a decree against him, unless he made an affidavit that the defendant absconded *to avoid the process of the court*, and could follow the requirements of 11 Geo. IV. and 1 Will. IV. s. 3.

After the above return of the common attachment, the plaintiff might have issued an attachment with proclamation, a commission of rebellion, and, after that, he might have obtained an order for a serjeant-at-arms; attachments with proclamations, and commissions of rebellion, having been dispensed with since the 26th August, 1841; and, lastly, he might—as he may still—proceed to a sequestration, but no further, as he could not have taken the bill *pro confesso* against the defendant, if he had *not appeared*, unless by force of the statute 5 Geo. II. c. 25,^d which empowered the court, upon a defendant refusing or neglecting to enter an appearance, upon being brought up by *habeas*, or being in custody, charged with the process of contempt, after fourteen days' previous notice in writing, requiring him to enter an appearance or to appoint a clerk in court to enter an appearance for him; and it also enabled the court to take the bill *pro confesso* when he absconded to avoid process. After the defendant has appeared, the court may, on the return of the sequestration, without the aid of any statute, take the bill *pro confesso*.

^d See Smith, C. P. 87.

Secondly, if the sheriff take the defendant, and accept bail, he returns a *cepi corpus*—i.e. “I have attached the within-named (*defendant*), as within I am commanded, whose body I have ready.” CHAP. VI.

Thirdly, if the sheriff arrest the defendant, and send him to prison, or find him already there for other suits, his return is—“I have attached the within-named (*defendant*), as within I am commanded, whose body remains in her Majesty’s gaol for my county of —, under my custody.” The plaintiff may then proceed, under the 29th Order, 8th May, 1845, or the 10 Con. Or. r. 4, to enter an appearance for the defendant.

II.—*In the Case of Formal Parties.*

11. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to the bill; but the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, without any indorsement requiring such party to appear thereto, and such bill, as against such party, shall pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this rule shall not prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit (26th Aug. 1841; Ord. 23). 10 Con. Or.
Rule 11.
Service of
copy of bill
on formal
parties.

12. Where a plaintiff serves a defendant with a copy of the bill under the 11th rule of this Order, he shall cause a memorandum of such service and of the time when such service was made, to be entered in the record and writ clerks’ office, first obtaining an order of the Rule 12.
Memoran-
dum of ser-
vice of copy
of bill to be
entered.

CHAP. VI. court for leave to make such entry, which order shall be obtained upon motion without notice, upon the court being satisfied of a copy of the bill having been so served, and of the time when the service was made (26th Aug. 1841; Ord. 24).

Rule 13.
Effect of
serving de-
fendant with
copy of bill.

13. Where a defendant is served with a copy of the bill, under the 11th rule of this Order, and a memorandum of such service is duly entered, and such defendant does not, within the time limited by the practice of the court for that purpose, enter an appearance in common form, or a special appearance under the 15th rule of this Order; the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause, in the same manner as if he had appeared to and answered the bill (26th Aug. 1841; Ord. 25).

Rule 14.
Party served
with copy of
bill may
enter com-
mon appear-
ance, and
have suit
prosecuted
in ordinary
way.

14. Where a party served with a copy of the bill under the 11th rule of this Order, desires the suit to be prosecuted against him in the ordinary way, he shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way. But the costs occasioned thereby shall be paid by the party so appearing, unless the court shall otherwise direct (26th Aug. 1841; Ord. 26).

Costs.

Rule 15.
Such party
may enter
special ap-
pearance and
be served
with notice
of all pro-
ceedings.

15. Where a party served with a copy of the bill under the 11th rule of this Order, desires to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance in the following form; (that is to say,) "A. B. appears to the bill for the purpose of being served with notice of all proceedings therein." And thereupon, the party entering such appearance shall be entitled to be served with notice of all

proceedings in the cause, and to appear thereon. But CHAP. VI.
 the costs occasioned thereby shall be paid by the party Costs.
 entering such appearance, unless the court shall other-
 wise direct (26th Aug. 1841; Ord. 27).

16. No party shall enter either a common or special Rule 16.
 appearance under the 14th or 15th rule of this Order, Order for
 after the expiration of twelve days from the service of entering
 the copy of the bill, without first obtaining an order of common or
 the court for that purpose; such order to be obtained on special ap-
 notice to the plaintiff, and to be granted, if the court pearance.
 shall think fit, upon such terms as are just. And any
 party so entering such common or special appearance Party enter-
 shall be bound by all the proceedings in the cause prior ing same
 to such appearance being entered, unless the court shall bound by
 otherwise direct (8th May, 1845; Ord. 37; and Ord. 16, prior pro-
 art. 5). ceedings.

17. The service of a copy of a bill upon a defendant, Rule 17.
 under the 11th rule of this Order, shall be of no validity Time for
 if not made within twelve weeks from the filing of such service of
 bill, unless the court shall give leave for such service to copy of bill.
 be made after the expiration of such twelve weeks (8th
 May, 1845; Ord. 16, art. 2).

18. Where the plaintiff omits to serve any defendant Rule 18.
 with a copy of the bill under the 11th rule of this Order, Service out
 within twelve weeks from the filing of such bill, the court of time of
 may, if it shall think fit, upon the motion of the plaintiff, copy of bill
 without notice, give the plaintiff leave to serve such de-
 fendant with such copy, within such time and upon such
 terms as to the court shall seem just (8th May, 1845;
 Ord. 28).

CHAPTER VII.

TO COMPEL APPEARANCE OF PEERS AND MEMBERS OF
PARLIAMENT.—OF A FEME COVERT.—OF AN INFANT.
—OF A PERSON OF UNSOUND MIND.—AND OF A COR-
PORATION.

Peer; served
with letter
missive.

Member of
House of
Commons.

IF a defendant, being a peer, be served with process, as before stated, and neglect to appear within the time allowed, he must formerly have been served with a subpoena; but, where the defendant was only a member of the House of Commons, a subpoena was issued in the ordinary manner, as in the case of other individuals; but the service of the subpoena in such cases being abolished, the peer must now in default of appearance be served with a printed copy of the bill. If they did not appear after service of the subpoena, the process was and is alike in both cases, viz. the plaintiff, in the case of a peer, having made affidavit of the above service, in addition to the service of the printed copy of the bill, moves, as of course, for a sequestration *nisi* against the defendant; upon which a commission of sequestration will issue, directed to certain commissioners therein named, to sequester the defendant's personal estate, and the rents, issues, and profits of his real estates, until he enters his appearance, or the court make any other order to the contrary; unless the defendant, having personal notice thereof, shall within eight days after such notice, show cause to the contrary

If no cause be shown, the plaintiff is at liberty, at the expiration of the eight days aforesaid, to move to make the order *nisi* absolute. The plaintiff may then, upon motion or petition, obtain an order that the solicitor of the defendant so having privilege of parliament or of peerage may enter an appearance for him; and that all other proceedings may be had, as if the defendant had actually appeared.^a

If a bill be filed against a husband and wife, and the wife refuse to appear, he will be allowed to enter an appearance for her.

Where, upon default made by a defendant in not appearing to or not answering a bill, it appears to the court that such defendant is an infant or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the court may, upon the application of the plaintiff, order that one of the solicitors of the court be assigned guardian of such defendant, by whom he may appear to and answer or may appear to or answer the bill and defend the suit.

But no such order shall be made, unless it appears to the court on the hearing of such application, that a copy of the bill was duly served in manner provided by the stat. 15 & 16 Vict. c. 86, and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the bill, and at least six clear days* before the day in such notice named for hearing the application, served upon or left at the dwelling-house of

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Husband and wife.

Process in case of an infant or a person of unsound mind.

Rule 3. Default in appearing or answering, by an infant or person *non compos mentis*. Assignment of solicitor as his guardian.

^a 1 Will. IV. c. 36, s. 12.

* The six days mentioned in this order must be clear days, Sunday being reckoned one: *Brewster v. Thorpe*, 11 Jur. 6. See also *Anderson v. Strather*, 10 Jur. 383; *Biddulph v. Lord Camoys*, 7 Beav. 580; 10 Jur. 485; *Hitch v. Wells*, 8 Beav. 576; *Taylor v. Ansley*, 9 Jur. 1055; *Cookson v. Lee*, 15 Sim. 302, as to service where there infants or persons of unsound mind.

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the person with whom or under whose care such defendant was at the time of serving such copy of the bill, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian of such infant, unless the court, at the time of hearing such application, shall dispense with such last-mentioned service (8th May, 1845; Ord. 32; and Ord. 16, art. 48; 7 Con. Ord. r. 3).

Rule 4.
Swearing
plea or an-
swer of in-
fant.

Where a plea and answer or a plea or answer severally shall be brought to be sworn by the guardian of an infant, the same shall not be sworn until the order appointing such guardian shall be produced to the person before whom the same shall be sworn (25th Oct. 1699; 7 Con. Ord. r. 4).

Rule 5.
Service of
notice of de-
cree or
order, in
case of
infants or
persons of
unsound
mind.

Where any person required to be served with notice of a decree or order, pursuant to the 8th rule of the 42nd section of the stat. 15 & 16 Vict. c. 86, is an infant or a person of unsound mind not found so by inquisition, the notice shall be served upon such person or persons and in such manner as the judge to whose court the cause is attached may direct (1st June, 1854; Ord. 5; 7 Con. Ord. r. 5).

Rule 6.
Guardians
ad litem for
infants or
persons of
unsound
mind.

Guardians *ad litem* appointed for infants or persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, shall be appointed in like manner as guardians *ad litem* to answer and defend are appointed in suits on bills filed (1st June, 1854; Ord. 6; 7 Con. Ord. r. 6).

Rule 7.
Such guar-
dians ap-
pointed
during pro-
ceedings at
chambers.

At any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian *ad litem* to be appointed for any infant or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order (1st June, 1854; Ord. 7; 7 Con. Ord. r. 7).

If proceedings be taken against a corporate body, who neglect to appear to the plaintiff's bill, a *distringas* must be issued against them, and not an *attachment*. If the defendant do not appear, an *alias distringas*, and then a *pluries distringas*, is issued, on the return of which, if no appearance be entered, a sequestration issues. And where proceedings were instituted to take a bill *pro confesso* against a company (which had been incorporated by Act of Parliament), and also against the directors of the company, notice of motion, served on one of the directors, to enter an appearance for the company, within five days after service, or that the plaintiffs would proceed to take the bill *pro confesso* against the company, was held to be irregular; for although the act made service on a director good service on the company, yet notice ought to have been addressed to the company.^b

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Proceedings
against a
corporate
body.

^b *Brickwood v. Harvey*, 8 Sim. 201.

CHAPTER VIII.

OF THE DEFENDANT'S APPEARANCE.—TIME GENERALLY.

A DEFENDANT upon being served with a printed copy of the bill, must as before stated, appear thereto within eight days after such service; but he may appear to a bill of his own accord without being served at all.

A defendant may after appearance demur alone to any bill, within twelve days after appearance thereto, but not afterwards (8th May, 1845; Ord. 16 art. 10; 37 Cons. Or. r. 3).

Whether the plaintiff does or does not require an answer to the bill, the defendant may without any leave of the court, put in a plea, answer, or demurrer to the bill, within the time allowed to the defendant for demurring alone to the bill, *i.e.* twelve days.

By the Orders, 26th August, 1841, and 8th May, 1845, the distinction between town and country causes in reference to the times of procedure is abolished (see 37 Cons. Or. r. 1).

Rule *4.
Time for
putting in
plea, answer,
or demurrer,
where defen-
dant re-
quired to
answer.

A defendant required to answer a bill, whether original or amended, must put in his plea, answer, or demurrer thereto, not demurring alone, within twenty-eight days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer (7th Aug. 1852, 1st Set, Ord. 19, 37 Con. Or. r. *4).

A defendant not required to answer a bill, may, without any leave of the court, put in a plea, answer, or demurrer, not demurring alone, within fourteen days after the expiration of the time within which he might have been served with interrogatories for his examination in answer to such bill (37 Con. Or. r. *5).

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Rule *5.
Time, where defendant not so required.

Where a defendant is ordered to answer amendments and exceptions together, he must put in his further answer and his answer to the amendments of the bill within fourteen days after he shall have been served with interrogatories for his examination in answer to the amended bill (37 Con. Or. r. *6).

Rule *6.
Time for answer to amendments and exceptions together.

Where he does not, and procures no enlargement of the time allowed, he shall be subject to the following liabilities:—

- (1.) An attachment may be issued against him ; Art. (1).
- (2.) He may be committed to prison, and brought to the bar of the court ; Art. (2).
- (3.) The plaintiff may file a traversing note, or proceed to take the bill *pro confesso* against him (8th May, 1845 ; Ord. 16, Art. 15). Art. (3.)

Where the plaintiff amends his bill without requiring an answer to the amendments, a defendant who has answered or has not been required to answer the original bill, but desires to answer the amended bill, must put in his answer thereto within fourteen days after the expiration of the time within which, if an answer had been required, he might have been served with interrogatories for his examination in answer to such amended bill, or within such further time as the judge may allow (8th May, 1845 ; Ord. 16, Art. 38, 37 Con. Or. r. *7).

Rule *7.
Time for answer to amendments, where no answer required.

8. Where a defendant, using due diligence, is unable to put in his answer to a bill within the times allowed by these Orders, the judge, on sufficient cause being shown, may, as often as he shall deem right, allow to such

Rule 8.
Further time to answer.

CHAP. VIII. defendant such further time and on such (if any) terms as to the judge shall seem just (8th May, 1845; Ord. 18. 7th Aug. 1852, 1st Set, Ord. 19, 37 Con. Or. r. 8).

Party in contempt may move to get rid of the contempt.

Although it be generally true, that a party in contempt cannot be heard to make a motion, he is nevertheless permitted to be heard upon a motion to get rid of that contempt; he may also except to a bill for scandal to have it expunged from the record:^a also, a plaintiff is entitled to sue out an attachment against a defendant for want of an answer, notwithstanding he is himself in custody for a contempt, in non-payment of costs.^b

^a *Everett v. Prythergch*, 12 Sim. 363.

^b *Wilson v. Bates*, 3 My. and Cr. 197; 9 Sim. 54.

CHAPTER IX.

TO COMPEL THE ANSWER OF A DEFENDANT.—PROCEEDINGS UNDER THE ORDERS 8th MAY, 1845, AND CONSOLIDATED ORDERS IN TAKING THE BILL PRO CONFESSO.

IF the defendant do not file his answer at the expiration of the period allowed him, or obtain further time for that purpose, the plaintiff is at liberty to attach him.

An attachment for want of an answer is sealed by the clerk of the records and writs, without any order for that purpose, or affidavit, and is executed and made returnable in the same manner as an attachment for want of appearance. An attachment being considered as sealed from the first moment of the day on which it is tested, if the defendant obtain an order for time on that day, it is irregular.^a

Attachment
for want of
answer.

The process of attachment, and the manner of returning and executing it, where the defendant neglects to answer, is similar to where it was issued for want of appearance. The defendant is then brought to the bar of the court by *habeas*, at the plaintiff's instance; and the plaintiff's counsel moves that he may be turned over to the Queen's Prison, to remain there until he shall fully answer the plaintiff's bill, clear his contempt, or the court make an order to the contrary.

^a 1 Madd. Rep. 550.

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After the defendant is in this manner lodged in prison, the plaintiff's next step, on the gaoler's certificate, is to move that a *habeas corpus cum causis* be directed to the keeper of the Queen's Prison, commanding him at the return thereof, to bring the defendant to the bar of the court, that he may clear his contempt; and that the clerk of the records and writs may at the same time attend with the record of the bill, in order that it may be taken *pro confesso* against the defendant.

Rule 1.
Attachment
for want of
answer.

Where there is just reason to believe that any defendant means to abscond before answering the bill, the Court may, on the *ex parte* application of the plaintiff, at any time after an appearance has been entered for him by the plaintiff, order an attachment for want of answer to issue against him; and such attachment shall be made returnable at such time as the court shall direct (8th May, 1845; Ord. 72, 12 Con. Or. r. 1).

Effect of
Ord. 73,
May 1845.

The 73rd Order, 8th May, 1845, directs that, if any defendant, being in custody of the sergeant-at-arms, or of a messenger, under an attachment for want of his answer, be not brought to the bar of the court within ten days after he was taken into custody, he must be discharged out of custody by the officer in whose custody he is, with costs, to be paid by the plaintiff; but the defendant is liable to be attached afresh, unless he put in his answer within eight days after his discharge: and, if any defendant be put in prison under, or being already in prison, be detained, under an attachment for not answering, and be not brought to the bar of the court within thirty days from his being in custody or detainer (being already in custody under such attachment), he must, in like manner, be discharged; but, to avoid a new attachment, he must put in his answer within eight days after such discharge (12 Cons. Or. r. 2).

Defendant

But where the defendant has appeared to the plain-

tiff's bill, and proceedings are had under a decree taking the bill *pro confesso*, for want of an answer in a foreclosure suit, the defendant, notwithstanding he be in contempt, ought to be regularly served with a summons to attend the judge's chief clerk. The court punishes the defendant's default in refusing to answer, by giving to the plaintiff the benefit of a decree upon the bill as confessed; but there the advantage stops: and when the decree is once pronounced, the subsequent duty of the court and its officers is to execute that decree in the ordinary way; therefore an order absolute, in the first instance, to obtain the chief clerk's certificate, made under a decree taken *pro confesso* for want of an answer, is irregular.^b

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in a foreclosure suit, although in contempt, ought to be served with a summons.

Where a defendant is in prison under an attachment for not answering, or, being already in prison, is detained under such an attachment, and is not brought to the bar of the court within thirty days from the time of his being actually in custody or detained (being already in custody) under such attachment, he shall be discharged from the process for want of answer under which he was arrested or detained by the sheriff, gaoler, or keeper of the goal in whose custody he is, without payment of the costs of his contempt, which in such case shall be paid by the plaintiff. But if such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him for want of his answer (8th May, 1845; Ord. 74, 12 Con. Or. r. 3).

Rule 3.
Discharge of defendant in prison.

New attachment.

Where a defendant is brought up in custody for want of his answer, and makes oath in court that he is unable by reason of poverty so employ a solicitor to put in his answer, the court, if not satisfied with the truth of that allegation, may direct an inquiry as to the truth

Rule 4.
Pauper defendant in custody for want of his answer.

^b King v. Bryant, 3 My. and Cr. 191.

CHAP. IX. thereof, and may appoint a solicitor to conduct such inquiry on the behalf of such defendant; and if it is ascertained by means of such inquiry, or if the court is satisfied without such inquiry, that such defendant is unable by reason of poverty to employ a solicitor to put in his answer, the court may assign a solicitor and counsel for such defendant to enable him to put in his answer (8th May, 1845; Ord. 75, 12 Con. Or. r. 4).

Assignment
of a solicitor
and counsel.

Rule 6.
Pauper
prisoners in
contempt.

Where application is intended to be made for the discharge of any prisoner in contempt, and for the payment out of the Suitors' Fund of the cost of such contempt, in pursuance of the provisions for that purpose contained in the statute 1 Will. IV. c. 36, notice in writing of such intended application shall be served upon the solicitor to the Suitors' Fund, two clear days at the least before the day upon which the application is intended to be made. And where an order is made under the said Act, or under the 4th Rule of this Order, directing an inquiry as to the fact of the poverty of any prisoner in contempt, notice in writing of such order and of every summons to proceed thereupon, shall be duly served upon the solicitor to the Suitors' Fund (6th Dec. 1844, 12 Con. Or. r. 5).

Rule 6.
Sequestra-
tion on re-
turn *non est*
inventus to
attachment
for want of
answer.

Upon the sheriff's return *non est inventus*, to an attachment issued against any defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration (26th Aug. 1841; Ord. 9, 12 Con. Or. r. 6).

Rule 7.
Resuming

Where a defendant, in contempt for want of answer,

obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, the plaintiff shall not be compelled, in case the answer is insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded (23rd Nov. 1831; Ord. 24. 3rd April, 1828; Ord. 24, 12 Con. Or. r. 7).

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former process of contempt, in case where answer is insufficient.

When the plaintiff seeks to compel an answer from a person having privilege of Parliament, he must proceed to obtain orders for a sequestration *nisi* and *absolute*, in the same manner as is adopted to compel his appearance to the plaintiff's bill, observing however that in addition to the affidavit of service and no cause being shown against making the order *nisi* for the sequestration absolute, the plaintiff must produce the certificate of the clerk of records and writs of the answer not having been filed: on the order *nisi* being made *absolute* the plaintiff proceeds, as in other cases, to take the bill *pro confesso* against the defendant.

To compel answer of a member of Parliament.

The same proceedings are also had to compel the several answers of a married woman, an infant, a person of unsound mind, and a corporation, as were before the Orders of 26th August, 1841, used to enforce their appearance. In the case of an infant, or a person of unsound mind not found so by inquisition, the court will, upon motion, order one of the solicitors of the court to answer for them as guardian, and so defend their suit.

The defendant must clear his contempt before he can take any effectual proceedings in the cause; and if he be in custody for want of an answer, he cannot, unless at the plaintiff's option, be liberated therefrom before he has filed his answer, paid or tendered the costs of his contempt, and obtained an order for his discharge. The

Defendant bound to clear his contempt before further step.

CHAP. IX. costs incurred by the process of contempt against the defendant for want of an answer, will not be allowed in taxing the costs of suit as between party and party. The plaintiff ought not therefore to release the defendant from custody before they are paid.^c

If the defendant put in an insufficient answer to the plaintiff's bill, the latter may, notwithstanding, take the bill *pro confesso*, for an insufficient answer is reckoned as no answer.^d

Plaintiff, by amending his bill, waives contempt.

The plaintiff however, by amending his bill, waives his process of contempt ;^e but he will be allowed upon application to the master, and giving personal notice to defendant, to amend his bill, without its operating as a discharge of such contempt, and to commence *de novo* where the defendant upon being brought to the bar of the court for his contempt refuses to put in his answer.

When the defendant puts in his answer without discharging the costs of his contempt, and plaintiff files his replication or takes any subsequent step in the cause, he thereby waives the process of contempt.

^c Attorney-General v. Carrington, 6 Beav. 454.

^d Joplins v. Stuart, 4 Ves. 619.

^e Gray v. Campbell, 1 R. and M. 323 ; Gompertz v. Best, 1 Will. IV. c. 36, r. 10 ; Landers v. Allen, 6 Sim. 619 ; Oldfield v. Cobbett, 1 Phill. 557 ; Haynes v. Ball, 5 Beav. 140.

CHAPTER X.

OF THE VARIOUS MODES OF DEFENCE TO A BILL.

THERE are four modes which the defendant, after he has entered his appearance, may adopt for the purpose of defending himself against the claims which are set forth in the plaintiff's bill:—1, by demurrer; 2, by plea; 3, by answer; 4, by disclaimer.

1. OF THE DEMURRER.

1. A demurrer is a mode of defence where any *apparent* objection arises to the plaintiff's bill itself, either from matter contained in it, or from defect in its frame, or in the case made out by it, and thereupon demands the judgment of the court, whether the defendant shall be compelled to answer the plaintiff's bill or not. A demurrer* is that which admitting the facts as alleged in the plaintiff's bill to be true, denies the right of the plaintiff upon those facts as therein set forth, to proceed or call upon the defendant to answer. And it has been held that if a plaintiff make two statements in his bill which are inconsistent with each other, the defendant is at liberty, for the purposes of a demurrer, to assume that to be true which will be most against the plaintiff's case: therefore, where a settlement is set forth in such a

* From *demorari*, or *demeurer*, to rest or abide the question.—
Vide 3 Blackstone, c. 21.

CHAP. X. manner in one part of the bill as to show that the plaintiff's father then living was tenant for life, and with remainder to the plaintiff as tenant in tail, and in another part of the bill the father is described as tenant in tail, and the plaintiff as *issue in tail*, the defendant was entitled on demurrer, to adopt this latter allegation to be true, and therefore that the plaintiff, by his own showing, had no right to institute the suit.^a The demurrer is merely to matters of fact contained in the bill, or upon the omission of matters which ought to be therein, or attendant thereon, and not upon any foreign matter alleged by the defendant.^b The demurrer confesses only matters of fact, and not matters of law.^c The principal object of a demurrer is to avoid a discovery which may prejudice the defendant, to recover a defective title, or to prevent unnecessary expense and delay.

All the defences may be joined.

All the above modes of defence, *i. e.*, the demurrer, plea, answer, and disclaimer, may be joined, provided each relates to a separate and distinct part of the bill; and a defendant may put in several demurrers to separate and distinct parts of a bill, for separate and distinct causes; but a defendant could not formerly have demurred and pleaded,^d or demurred and answered, to the *same matter*, for the answer would have overruled the demurrer.^e In like manner also, if the defendant had pleaded to any part of a bill before demurred to, the plea would have overruled the demurrer.^f

37 Order,
26th August,
1841.

But, by the 37th Order, 26th August, 1841, no demurrer or plea shall be held bad, and overruled upon

^a *Vernon v. Vernon*, 2 My. and Cr. 145. See also *ante*, 238.

^b Mitf. 108.

^c 2 Ves. and B. 95; 3 Meriv. 503; *Cuthbert v. Creasy*, 6 Madd. 189.

^d *Domer v. Fortescue*, 2 Atk. 283.

^e *Jones v. Earl of Strafford*, 3 P. Wms. 80. ^f Mitf. 209.

argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea (14 Cons. Or. r. 9). CHAP. X.

Demurrers to original bills, which comprehend the various defences made to all other species of bills, are considered under two heads,—first, demurrers to *relief* (which sometimes include a demurrer to discovery), and secondly, demurrers to *discovery* only.^g

The principal grounds of demurrer to the *relief* sought by an original bill, are— Ground of demurrer to the relief.

1. That the subject of the suit is not within the jurisdiction of a court of equity, as where the courts of ordinary jurisdiction are made instruments of oppression and wrong; a court of equity being usually applied to, where the courts of ordinary jurisdiction cannot give any, or at best but an inadequate relief.

2. That some other court of equity has the proper jurisdiction. The principal of the inferior jurisdictions in England were those of the counties palatine of Chester, Lancaster, and Durham,* the courts of the two Universities of Oxford and Cambridge, of the City of London, and of the Cinque Ports; which are limited by their locality either in respect to the subject of the suit, or the residence of the litigant parties. When, therefore, it is apparent on the face of a bill, that any of these courts has the proper jurisdiction, the defendant may demur.

3. When it appears upon the face of the bill that the plaintiff is not entitled to sue by reason of some personal

^g Mitf. 109.

* The 1 Will. IV. c. 70, abolished the exclusive jurisdiction of the county palatine of Chester, which is now merged in that of the courts of Westminster. And by the 6 & 7 Will. IV. c. 19, the palatine jurisdiction of the county palatine of Durham, and all its legal rights, were severed from the bishopric of Durham, and vested in the crown.

CHAP. X. disability, as where an infant, or a married woman, or an idiot exhibiting a bill, appear to be thus incapable of instituting proceedings alone, and no next friend or committee is named in the bill,—the reason why a defendant may demur to such a bill is, that he might be materially injured by being compelled to answer a bill exhibited by persons whose property is not at their own disposal, and who are incapable of paying costs.^h

4. That the plaintiff has no interest in the subject, or a proper title to institute a suit concerning it; as where an executor does not appear by his bill to have proved the will of the testator, or appears to have proved it in an improper court, or where a plaintiff claimed under a will when it was discovered upon the construction of the will that he had no title: and a want of interest in the subject of the suit is a good ground of demurrer, not only to a bill for relief, but also to a bill seeking discovery merely.

5. That the plaintiff has no right to call on the defendant concerning the subject of the suit, notwithstanding he may have an interest in the suit, and a right to institute a suit concerning it. Thus, although an unsatisfied legatee has an interest in the testator's property, and a right to have it applied to satisfy his demands in a due course of administration, yet he cannot file his bill calling upon the debtors to his testator's estate to pay their debts in satisfaction of his legacy; and this is by reason of the want of privity between the legatees and debtors, the latter being accountable only to the representative of the testator.^{i*}

Neither can creditors file a bill against a trustee appointed by a person for the payment of his debts; for in

^h Mitf. 154.

ⁱ Mitf. 158.

* But see 1 R. and My. 281 *n.*, and *Pearse v. Hewitt*, 7 Sim. 471, as to joining executors and debtors in a suit by legatees. See also *Barker v. Birch*, 10 Law Times, 66, and the cases there cited.

such a case the character of trustee and *cestui que trust* never existed between the creditors and the trustees of the title-deeds, the settlor himself being the only *cestui que trust*.

“A man who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts; his object is not to benefit his creditors.”^j

6. That the defendant has not that interest in the suit which can render him liable to the claims of the plaintiff; as where a bankrupt is made a defendant to a bill, which is filed against his assignees: for, by the act of bankruptcy, all the interest which the bankrupt was possessed of, or entitled to, passes from him to his assignees, and therefore, in respect of the *relief* applied for by the bill, he may demur, although if any *discovery* be sought of his actions prior to his becoming a bankrupt, he may be compelled to answer to that part of the bill for the sake of the discovery.

From these few instances, which have been adduced to show in what cases a demurrer will lie, we perceive that, in order to prevent a party from demurring, the bill must, in general, not only show that the defendant has an interest in the subject, but that he is also liable to the plaintiff's demands.

7. That for some reason, founded on the substance of the bill, the plaintiff is not entitled to the relief he prays; as where, in a bill to perpetuate the testimony of witnesses, it is not stated that no action can be immediately brought.^k

^j Per M. R., in *Bill v. Cureton*, 2 My. and K., 511, in allusion to *Wallwyn v. Coutts*, 3 Mer. 707, and *Gerrard v. Lord Lauderdale*, 3 Sim. 1. *Vide* 2 Keen, 134.

^k *Angell v. Angell*, 1 S. and S. 83.

CHAP. X.

8. That the bill is insufficient to answer the ends of complete justice; for as it is the object of a court of equity to do complete justice between the parties interested in the subject of the suit, and to make the performance of the order of the court safe to those who are compelled to obey it, and prevent future litigation,¹ a demurrer will be allowed to a bill where all persons materially interested in the suit are not made parties thereto, how numerous soever they may be: but the court will, in such cases, depart from this general rule, where there exists a difficulty in bringing all the parties interested before the court, and all the persons who are in the same interest, and answering that description, cannot be easily ascertained. For this reason a few creditors may file a bill on behalf of themselves, and all the other creditors of their deceased debtor, for an account and application of his assets in the payment of their demands.

The defendants, in demurring for want of parties, must show who are the proper parties, to enable the plaintiff to amend, by adding the proper parties to the record. A bill may also be demurred to where the signature of counsel has been omitted.

9. That the bill improperly confounds distinct subjects, or unnecessarily multiplies suits; therefore, as, on the one hand, a plaintiff will not be allowed by one bill to demand several matters of various natures against each defendant, tending to burden him with an accumulation of pleadings, referring merely to the several claims of the other defendants, without any connection with his own; so, on the other hand, the court will prevent the splitting of causes and the multiplicity of suits consequent thereon,^m and, in either case, will entertain a demurrer. And where there are several defendants it may happen that a bill which is multifarious as to one of the defen-

¹ Mitf. 164.

^m Mitf. 183; *Dunn v. Dunn*, 2 Sim. 329.

dants is not so as to the rest; thus, in *Attorney-General v. Craddock*,ⁿ one of the defendants demurred to the information for multifariousness, and the demurrer was allowed—the other defendants having pleaded the allowance of that demurrer, the plea was overruled. But where the defendants are all in the same interest, as the assignees of a bankrupt, the case against all of them being the same, a demurrer having been allowed as to one of them was held sufficient to bar the plaintiff's demand as to the rest of the defendants.^o

The distinction between multifariousness and misjoinder has been usually understood as follows:—namely, that the former consists in mixing up several matters in one bill, which ought to be made the subject of distinct suits; and the latter—*i. e.* misjoinder—is where persons are improperly introduced as parties to the record: but this definition will not exactly meet the dicta of the learned judges upon the subject. Indeed, it will be seen, by reference to this part of pleading, that where a suit is multifarious it necessarily involves a misjoinder, either of plaintiff or defendant. On the other hand, there may exist a misjoinder of parties, without multifariousness; where, for instance, a defendant properly objects that he ought not to be made a party to the record, this objection does not necessarily imply that the bill is multifarious.

The lord chancellor (Cottenham), in *Campbell v. Mackay*,^p confesses that, “to lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is upon the authorities utterly impossible.”

In reference to *misjoinder*, this learned judge, in the

ⁿ 8 Sim. 467.

^o *Tarleton v. Hornby*, 1 You. and Col. 333.

^p 1 My. and Cr. 619.

CHAP. X. same case, says it is where "the cases or claims recited in the bill are of so different a character that the court will not permit them to be litigated in one record." And that "what is more familiarly understood by the term *multifariousness*, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever."

And, in *Brookes v. Whitworth*,^a it was held that a defendant has a right to insist that he is not bound to answer a bill, containing several distinct and separate matters, relating to individuals with whom he has no concern.

Thus it appears, from the above description given by Lord Cottenham, that the term misjoinder is equally applicable to the improper introduction of *distinct matters*, as well as parties to the record.

Where there are several parties, although unconnected, they may be joined in a suit, provided they have among themselves one common interest centring in the point in issue in the cause.^r

And it does not follow that where there are several matters inserted in the bill, although of a distinct nature, an objection on that account will prevail; if, for example, there exists some connecting link, rendering a combination of them convenient to be settled by means of one and the same suit, the court will prefer determining the claims of all the parties by the same decree to the allowing of separate proceedings.^s

Ground of
demurrer to
discovery.

The principal grounds of objection, by way of demurrer to the *discovery*, are now to be considered, which are the following:—

^a 1 Madd. 86.

^r *Ward v. Duke of Northumberland*, 2 Anstr. 469.

^s Calv., 2nd edit. 96.

1. That the case made by the plaintiff is not such as that a court of equity will exercise a jurisdiction to compel a discovery; for instance, where the discovery is sought to aid the prosecution or defence, or any other process, not merely civil, in any other court, as an indictment or information.

2. That the plaintiff has no interest in the subject which will entitle him to call upon the defendant for a discovery; as where the plaintiff seeks for a discovery in support of an action at common law, and the case stated by his bill is not such a one as will support an action: for, supposing his case to be true, unless he can show a title to recover in the action at law, he has no right to the aid of a court of equity to call upon the defendant to disclose evidence of the truth of the case.

3. That the defendant has not such interest in the subject of the suit as will justify the plaintiff in instituting proceedings against him; as where he is merely a witness, claiming no benefit whatever under the suit, or where the bill is filed against a *feme covert* and her husband in aid of an action of debt on her account.^t

4. That there is no privity between the plaintiff and defendant, although they may both claim an interest in the subject of the suit.

5. That the discovery, if obtained, would be immaterial.

6. That the situation of the defendant is such as renders it improper for a court of equity to compel a discovery; as where the bill charges the defendant with an act which would subject him to a criminal prosecution under a statute, or to any particular penalties, unless it should happen that the plaintiff is alone entitled to the penalty, and waives it by express words in the bill. In such a case he may enforce a discovery from the defendant; for the discovery cannot any longer subject him to

^t Barron v. Grillard, 3 Ves. and B. 165.

CHAP. X. a penalty:^u or when the discovery would subject the defendant to some forfeiture, or hazard his title in a case, where, in conscience, he has at least an equal right with the party demanding the discovery.

It may be here remarked that a demurrer to a bill for a discovery only will not hold for want of parties.^v

A defendant, although he may think proper to give the discovery, is still entitled to demur to the relief:^w but he cannot demur to a discovery only, unless he demur to the relief; for then he does not demur to the thing required, but the means by which it is sought to be obtained.^x

A demurrer need not be entered with the Registrar, but when once it is filed, it may be set down for argument immediately by either the plaintiff or defendant (14 Cons. Ord. r. 11).

The demurrer is heard by the judge to whose court the cause has been attached, unless otherwise ordered by the Lord Chancellor.

Speaking
demurrer,
what.

When any new matter is introduced, which is essential to the support of the demurrer, it is called a *speaking* demurrer, and will be overruled; but the mere introduction of argument is considered as nothing more than surplusage, and does not render the demurrer a speaking demurrer (*vide* also 14 Cons. Ord. r. 1).

Demurrer
drawn and
signed by
counsel.

The demurrer is drawn and signed by counsel. It neither requires to be signed by the defendant, nor to be put in upon oath; because the demurrer, being an admission of the truth of the facts alleged in the bill, submits to the court whether the defendant is bound to answer such allegations as are therein set forth.

Nodemurrer

A defendant cannot demur after obtaining an order

^u Mitf. 195.

^v Ibid. 200.

^w 2 Atk. 157; Todd v. Gee, 17 Ves. 273.

^x 2 Bro. C. C. 126.

for time, otherwise it will be taken off the file with costs: CHAP. X.
 neither can it be filed after an attachment has issued after order
for time.
 against a defendant for want of an answer; but the defendant is at liberty, after obtaining an order for time, to put in his demurrer and answer.

A demurrer which goes to the whole bill, and, upon Demurrer
usually ends
the suit. argument or otherwise, is allowed, puts an end to the suit, although the court will give the plaintiff leave to amend the bill upon payment of costs. But, although, strictly speaking, when a demurrer to the whole bill is allowed, the bill is out of court, and the plaintiff must begin *de novo*,—yet there have been instances where, after the bill has been dismissed by order, the cause has been set on foot again at the discretion of the court.^y

After a demurrer is overruled, if the defendant wishes to plead answer or demur, he must apply specially for time when the demurrer is disposed.^z

On the argument of the demurrer the court will take into consideration the nature of the case, in order that it may consider not only as to whether there ought to be any direction given as to the costs, but as to whether leave ought to be given to amend the bill. It being entirely in the discretion of the court to direct either upon the facts appearing before it.^a See 14 Cons. Ord. r. 12.

The 45th Order of 8th May, 1845, directs that, where a demurrer to the whole or part of a bill is allowed upon argument, the plaintiff, unless the court order to the contrary, is to pay to the demurring party the costs of the demurrer; and, if the demurrer be to the whole bill, the costs of the suit also (14 Cons. Ord. r. 13).

Under the 16th art. of Order XVI., a defendant may

^y Baker v. Millish, 11 Ves. 72.

^z 1 Sim. and Stu. 469.

^a Schneider v. Lizardi, 9 Beav. 461; 15 Law Jour. 235.

CHAP. X. demur alone to any bill within twelve days after his appearance thereto, but not afterwards.

When demurrer held sufficient.

When the demurrer to the whole bill is not set down for argument within twelve days after the filing thereof, and the plaintiff does not within that time serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs as in the case of a demurrer to the whole bill allowed upon argument. Where a demurrer to part of a bill is not set down for argument within three weeks after the filing thereof, and the plaintiff does not within the three weeks serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs as in the case of a demurrer to part of a bill allowed upon argument (Orders 45, 46, 47; 14 Cons. Ord. rr. 14 and 15).

II. OF THE PLEA.

Plea used when objections are not apparent on the bill.

We have seen that a demurrer is a mode of defence when any objection is apparent on the face of the bill itself; but, when the objection to a bill is not thus apparent, and the defendant means to take advantage of it, he must do so by a *plea*, or by answer. Various facts cannot be pleaded in one plea unless they all tend to reduce the cause to a single point of defence, as where there are several deeds which all conduce to establish the single point of title.^b A plea is sometimes denominated a special answer, which, so far as it applies, creates a bar to the suit. It has been said that the object of a plea is to reduce the cause, so far as it is covered by the plea, to a

^b 2 Ves. and B. 153; Ashurst v. Eyres, 3 Atk. 341; Ritchie v. Aylwin, 15 Ves. 82.

simple point, in order to save expense to the parties; therefore, where the defence consists of a variety of circumstances, a different mode of defence must be used, as the examination must still be at large.^c That which is called a double plea is informal and improper: for, if a defendant were allowed to offer two matters of defence, he would, by the same reason, be justified in making any number of defences, whereby the object of the plea would be frustrated, and all the inconvenience and delay would be introduced, which it was the main design of pleading to obviate; and the court would be called upon to give a summary decision on a variety of defences before proof thereof could be given;^d although, under special circumstances, the court will give leave to the defendant to plead doubly.^e

Pleas are of three kinds—I. To the jurisdiction of the court; II. To the person of the plaintiff or defendant; III. In bar of the suit. Pleas three kinds.

I. A plea to the *jurisdiction of the court* does not dispute the right of the plaintiff, but simply asserts that the plaintiff's claim is not a fit subject for the cognizance of a court of equity; although, if the objection for want of jurisdiction be apparent on the bill, the proper defence is by demurrer. In a plea to the jurisdiction, it is not sufficient to allege merely that the court of equity has no jurisdiction, but it must be shown what other court has jurisdiction.^f To the jurisdiction.

II. A plea to the *person of the plaintiff* does not dispute the validity of the rights which form the subject of the suit, but denies the plaintiff's right to sue, alleging, either that he cannot proceed alone, or that he is not the person he pretends to be, or that he does not sustain To the person of plaintiff.

^c Mitf. 219.

^d Mitf. 296.

^e Kay v. Marshall, 1 Keen, 190.

^f Ear of Derby v. Duke of Athol, 1 Ves. 202.

CHAP. X. the character he professes to assume.^g The plea to the person must show that he is disabled to sue, as being—
 1. Outlawed, which is a good plea as long as the outlawry remains in force: but no plea of outlawry shall be allowed without pleading the record *sub pede sigilli* (14 Cons. Ord. r. 4). Outlawry in a plaintiff, executor, or administrator, cannot be pleaded, because he sues in *autre droit*, nor against a person named in the bill as the next friend of an infant plaintiff. Formerly a plea that the plaintiff was excommunicated, was a good plea, but such a disability no longer affects a person's civil rights.

2. That the plaintiff is a Popish recusant convict.^h

3. That the plaintiff is unable to sue, by reason of attainder in a *præmunire*, or in respect of treason or felony.

4. That the plaintiff is an alien. But an alien who is an alien friend is capable of suing for any personal demand;ⁱ and even an alien enemy may sue, under some circumstances.^j

5. That the plaintiff is incapable of instituting the suit *alone*, as an infant, a *feme covert*, or lunatic, found so by inquisition.

A plea that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, is good; as where an executor filed a bill before probate of the will,^k unless he alleges that the will is proved; or when the plaintiff sued as administrator, and the defendant pleaded that he was not an executor.^l Also, where the plea alleges that the plaintiff has no interest in the subject of the suit, or that the defendant has not any interest therein. The plea may also be sustained where one of two plaintiffs has no interest; and this will be a good defence to the whole bill.

^g Mitf. 221.

^h 3 Jac. I. c. 5, s. 11.

ⁱ 1 Atk. 51.

^j 3 Burr. 1741.

^k 2 Sim. 241.

^l Winn v. Fletcher, 1 Vern. 473.

III. *Pleas in bar* are usually described as allegations CHAP. X.
of foreign matter, whereby, admitting the bill, so far as In bar of
it is not contradicted by the plea, to be true, yet the suit, suit.
or so much of it as is covered by the plea, is barred.^m
Pleas of this kind are divided into—1, Pleas in bar of
matters recorded, or as of record in the court itself, or
some other court of equity; 2, Pleas in bar of matters of
record, or of matters in the nature of record, in some
court *not being a court of equity*. Under the former
head are considered:—

1. A decree of the court, by which the rights of the parties have already been determined, or some previous bill for the same cause dismissed; but a plea of such former decree must have been signed and enrolled, and the decree must be final, otherwise it will not operate as a bar to the suit, although the defendant may insist upon it by way of answer. Also the defendant may plead another suit, for the same cause, depending in the same or another court of equity. This plea must distinctly aver that the suit is for the same cause of litigation as the other, otherwise it will be overruled; as bad in point of form.ⁿ If a plaintiff be proceeding at the same time against the defendant, both at law and in equity for the same cause, the defendant, on putting in his answer, may apply to the court, for the purpose of compelling the plaintiff to elect before what tribunal he will proceed;—but, if a party commence proceedings both at common law and in a court of equity, in his individual character, and not in *autre droit*, and can obtain in the former jurisdiction only a part of the relief which he can obtain in the latter; by instituting his suit in equity, he precludes himself from proceeding at law, and therefore is not entitled to the right of election.^o

^m Mitf.

ⁿ Mitf.

^o Mills v. Fry, 19 Ves. 227.

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The dependency of a former suit for the same matter is a good plea. But where the plaintiff disputes the truth thereof, he may, on motion or petition, of course, obtain an order for an inquiry as to its truth. And such order, and a certificate in pursuance thereof, shall be obtained within one month after the filing of such plea: otherwise the defendant may obtain, as of course, an order to dismiss the bill (14 Cons. Ord. r. 6).

2. Pleas in bar of matters of record, or of matters in the nature of matters of record, in some court *not being a court of equity*, are—

(1.) A plea of a fine and non-claim, which is considered as good an equitable as it is a legal bar, provided it be pleaded with proper averments: and herein it is said that seisin must be stated, otherwise the plea will be overruled, although the court will allow the defendant to amend.^p

There is a distinction between legal and equitable titles, for where equity charges the lands only, the fine bars; but, where it charges the person only, it does not operate as a bar. Thus, if a purchaser of an estate from a trustee has levied a fine, he will be considered in equity as standing precisely in the same situation and character as the trustee was, provided he had notice of the trust, or purchased without consideration.^q But, where a person comes in under a title adverse to the title to a trust estate, or comes in for a valuable consideration without notice of the trust, he may set up a fine and non-claim as a bar to the claim of a trust.^r

(2.) A plea of recovery duly suffered with the deed, leading the uses thereof, may be pleaded by the defendant if the estate limited to the plaintiff in tail is thereby destroyed.^s

^p 2 Ves. 450.

^r Mitf.

^q Mitf.

^s Mitf.

(3.) A judgment at law, or sentence of some other court, provided the court has had full jurisdiction to determine the rights of the parties, and such rights have been fully determined therein. A sentence, also, in the proper ecclesiastical court, in respect of a will and probate, will be considered a good plea to a bill exhibited by persons claiming as next of kin to one supposed to have died intestate.

Pleas in bar of matters *in pais*, which go both to the discovery and relief sought by the bill, or some part of it, or which sometimes extend no further than the relief, are—

1. A stated account, which must show that the account was in writing, or at least it must set forth the balance.^t If the bill charge that the plaintiff has no counterpart of the account, the account should be annexed, by way of schedule, to the answer.^u The defendant ought to aver that the stated account is just and true, to the best of his knowledge and belief.^v

2. An award, which is a good plea to a bill to set aside the award and open the account, may not only extend to the relief, but also to the discovery sought by the bill; but if fraud or partiality are charged against the arbitrators, they must deny them, not only by the plea, but also by way of answer.

3. A release by the plaintiff of the subject of his demand may also be set up as a good plea on the defendant's part, in bar of such demand: but the defendant must set out the consideration for which the release was granted; consequently, the plea of release cannot extend to a discovery of such consideration,^w and where that is impeached by the bill, on the ground of fraud, the plea must be supported by averments tending to falsify the

^t 2 Atk. 299.

^v Sch. and Lefr. 727.

^u 2 Atk. 299.

^w Mitf. 262.

CHAP. X. allegations of fraud and weaken the position on which the consideration is sought to be impeached.

4. A will, or other instrument affecting the rights of the parties, may be pleaded by a devisee under the will, or a person to whom a conveyance has been made under the deed, to a bill instituted against them by the heir-at-law of the testator, in respect of the estate so devised or conveyed; and, in these cases, the devisee must plead the will, and that it was duly executed, and the defendant who claims under the conveyance may plead the instrument by which the property was conveyed to him by the ancestor.

5. The statute of 29 Car. II. c. 3, for preventing frauds, may be pleaded, as far as its provisions extend, in bar of a suit.

Thus, to a bill for a specific performance, a plea of the statute that there was no agreement in writing signed by the parties was held to be good.^x It was formerly a *vexata quæstio* whether this plea extended to the *discovery* of a parol agreement as well as the *relief* (*i. e.* the performance of it), except where the contract has so far been performed as to be considered a fraud on the party seeking the benefit of it, and otherwise rendering it impossible to put him *in statu quo* unless it were fully executed. But, after much doubt and contrariety of opinion upon the matter, it now appears decided that a plea of the statute does not extend to a bar of the discovery of the fact of an agreement, because, notwithstanding the defendant in his answer confesses a parol agreement, yet if he insist on the protection of the statute, no decree can be pronounced against him on the ground of his confession.^y

Statute of The Statute of Limitations may be also the subject of a

^x *Mussell v. Cook*, Prec. in Ch. 533.

^y Mitf. 267.

plea : but, although the statute is a bar to the claim of a debt, it was formerly considered as not capable of being pleaded to the discovery when the debt became due, for that would enable the court to see whether the time limited by the statute had elapsed ; but the contrary doctrine now holds, on the principle that, where a demurrer to the relief would be good, it is equally available to the discovery on which the relief was founded.^z Any other statute, whether public or private, whereby the demands of the plaintiff may be barred, may be pleaded to avoid the equity attempted to be set up against the effect of the statute.

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Limitations
may be
pleaded.

If a plaintiff has a full title to the relief he prays, and the defendant cannot set up a defence as a bar of that title, yet, if the defendant has an equal right to the protection of the court of equity in defending his possession, as the plaintiff has to assert his right, the court will not interfere on either side ; as where the defendant claims under a purchase or a mortgage for a valuable consideration, without notice of the plaintiff's title, which he may plead in bar.^a

Equal
equities.

The foregoing objections to a bill, of which we have been speaking, extend to *discovery* as well as *relief* where the discovery was only sought for the purpose of relief. We shall now merely mention such as are a ground of plea to the *discovery* only. These are,—

Objections
to a bill for
discovery
only.

1. That the plaintiff's case is not such as entitles a court of equity to compel a discovery in his favour.

2. That the plaintiff has no interest in the subject, or no interest in the suit, which gives him a right to enforce a discovery from the defendant. As where a plaintiff in his bill alleges that he is heir or administrator of a person who died intestate, and seeks a discovery from the defendant who is in possession of the deceased's property,

^z Mitf. 269.^a Mitf. 274.

CHAP. X. and of his title thereto—a plea that another person is heir or personal representative is good.

3. That the defendant has no interest in the suit to entitle the plaintiff to call upon him even for a discovery only.

4. That the situation of the defendant may render it improper for a court of equity to enforce a discovery—1. Because the discovery may subject him to pains and penalties, or tend to accuse him of any crime; 2. Because it will subject him to forfeiture, unless the plaintiff be the only person entitled to the benefit of the forfeiture, and expressly waives it by his bill; 3. Because such discovery would betray confidence reposed in the defendant, as counsel, attorney, or arbitrator; and, 4. Because the defendant is a purchaser for a valuable consideration, without notice of the plaintiff's title; for, in this case, the court will not compel him to make a discovery of that which may affect his own title.^b

Duty of plaintiff for separating that which he may and may not require an answer to,

It is the duty of a plaintiff in framing his record, and in asking for a discovery, to separate the matters to which he is entitled to require an answer from those which he cannot legally call upon the defendant to discover; thus, where the plaintiff seeks discovery of matters which might subject the defendant to a criminal prosecution, and also seeks other discovery which might have been legitimately asked for, and which the defendant is bound to give, but are mixed up with other matters, or so connected with them, either by way of inference or of exclusion, that they might lead to a disclosure of circumstances which would subject the defendant to be prosecuted for the offence with which he was charged, he is not bound to answer any portion of it.^c

Plea must be precise when not to

If the plea do not go to the whole bill, it must express to what part of the bill it does extend; therefore,

^b Mitf. 288.

^c Earl of Lichfield v. Bond, 6 Beav. 94.

if the defendant plead to such parts of the bill as are not answered, the plea will be overruled as too general. CHAP. X.
the whole bill. Generally, in pleading, equity requires the same strictness and precision as a court of law. It is said that a plea ought not to exhibit more defences than one; and, although a plea may be bad in part only, and therefore overruled as to that portion of it, and allowed as to the remainder, yet two defences in a plea will not be separated, and only one admitted as a bar.

If the bill contain any charge which, in equity, may operate in favour of the plaintiff's case against the matter pleaded, as fraud or notice of title, the charge must be denied by way of answer, as well as by averment in the plea.^d In this case, the answer will not support the plea unless it be full and clear. If the bill alleges facts which if true would contradict the allegations of the plea, or be evidence to disprove them; the plea must be supported by an answer giving discovery as to those facts.^e

The form of a plea, like a demurrer, commences by a protestation against confessing the truth of any matter. Commencement of plea. For the sake of deciding the validity of a plea, the bill, so far as it is not contradicted by the plea, is assumed to be true. The extent of the plea, that is, whether it goes to the whole of the bill, or to part of it only, and to what particular part, must next be set forth clearly and distinctly. Then follow the defendant's grounds of objection to the jurisdiction of the court, to the person of the plaintiff, or in bar of the suit, supported by averments. The plea then concludes with a repetition that the matters so offered are relied upon as a bar of the suit, and prays judgment, whether the defendant shall be

^d Mitf. 298.

^e Hunt v. Penrice, 2 Eq. Rep. 209; 18 Jur. 4; 23 Law Jour. 339
2 Week. Rep. 87.

CHAP. X. — compelled further to answer the bill, or so much of it as is pleaded to.^f

Pleas to the jurisdiction, to the person, or in bar of any matter recorded (unless accompanied with averments of matter *in pais*),^g do not require to be put in upon oath; but pleas of bars of matters *in pais*, must be put in upon oath of the defendant (14 Cons. Ord. r. 2).

Practice
when the
validity of
a plea comes
on for
argument,

When the validity of a plea comes on for argument, it may either be allowed simply,—that is, the plea is deemed a full bar to so much of the bill as it extends to,—or the benefit of it may be saved to the hearing, and is thus considered that, so far as it appears to the court, it may prove a defence, but that, supposing the matter pleaded be really true, there may be matter disclosed in evidence which would avoid it; or, lastly, it may be ordered to stand for an answer, which shows that it contains matter which may prove to be a defence, or part of a defence, but that it is not a full defence, or that it has been informally offered by way of plea, or that the answer has not sufficiently supported it, which renders the truth of it doubtful.^h

If a plea to the *whole* bill be ordered to stand for an answer, the plaintiff cannot except thereto, because it is under these circumstances considered as a sufficient answer; an insufficient one being looked upon as no answer.

Where plea
untrue in
act.

If the plea, although good in point of form and substance, be untrue in fact, the plaintiff should take issue thereupon, by replying to it. When the plaintiff has filed his replication to a plea, he may dispute the truth of such plea, although he cannot impeach its validity.ⁱ

After a plea has been overruled, the defendant cannot file another plea or demurrer without a special order for

^f Mitf.

^g Wall v. Stubbs, 2 Ves. and Beav. 354.

^h Mitf. 303.

2 Eq. Ca. Ab. 70.

that purpose, nor can he, without such order, file a plea after a demurrer has been overruled.^j

When a plea is put in which shows that the plaintiff is not entitled to relief, it protects the defendant from making the discovery; but if the defendant, on the face of his plea, purports to plead to the relief only, he thereby admits the plaintiff's right to a discovery, and ought to give that discovery, otherwise the plea is bad.^k

A plea cannot be amended as of course; but the court will require a special application to be made by the defendant to amend.

Where a plea to the whole or part of a bill is allowed upon argument, the plaintiff, unless he undertakes to reply to the plea, or unless the court otherwise directs, shall pay to the party by whom the plea is filed the costs of the plea, and where the plea is to the whole bill, the costs of the suit also; and in such last-mentioned case the order allowing the plea shall direct the dismissal of the bill (8th May, 1845; Ord. 48; 14 Cons. Ord. r. 16).

When a plea to the whole or part of a bill is not set down for argument within three weeks from the filing thereof, and the plaintiff does not, within such three weeks, serve an order for leave to amend the bill, or does not within that time, by notice in writing, undertake to reply to the plea, it is to be held good to the same extent and for the same purposes, and the same costs are to be paid by the plaintiff, as in the case of a plea to the whole or part of a bill allowed upon argument; and where the plea is to the whole bill, the defendant, by whom such plea was filed, may, at any time after the expiration of such three weeks, obtain, as of course, an

Where plea is not set down for argument within three weeks.

^j 1 S. and S. 511.

King v. Hemming, 9 Sim. 59.

CHAP. X. — order to dismiss the bill (Ord. 49 ; 8th May, 1845 ; 14 Cons. Ord. r. 17).

Where the plaintiff undertakes to reply to a plea to the whole bill, he shall not, without the special leave of the court, take any proceedings against the defendant by whom the plea was filed till after replication (Ord. 50 ; 8th May, 1845 ; 14 Cons. Ord. r. 18).

The defendant cannot, whilst the plea is pending, move to dismiss the plaintiff's bill for want of prosecution ; but if he be desirous of disposing of the suit, he must himself set down the plea for argument.

III. THE ANSWER.—MODE OF PUTTING IN THE SAME.—TIME, ETC.

Answer,
nature of.

The defendant is compelled to make a full discovery of the facts charged in the plaintiff's bill, provided they be essential to enable him to obtain a decree, and are not such as would render him liable either to a criminal prosecution or forfeiture ; therefore, whenever he does not either plead or demur, or, having done either, the plea or demurrer is overruled, he must put in his answer to the whole bill : and in case the plea or demurrer is allowed to only part of the bill, then he must answer to such part of the bill as is not covered by the plea or demurrer, unless he disclaims. An answer is the most usual mode of defence, and, as it is capable of embracing more circumstances than a plea, it may, for this reason, be used with much greater propriety in cases where the defendant is not anxious to prevent a discovery, although the plea might be a complete bar ; for where, by introducing additional circumstances, he has a good opportunity of showing his case in a more favourable light, the answer is the best mode of defence. Thus, where a bill is filed to set aside a contract, the purchaser may plead a valuable con-

sideration, and no notice of plaintiff's title, which would be a good defence; but, if he can set forth the additional circumstance in his favour, of having expended large sums of money in improvements on the estate, with the plaintiff's knowledge, it would be more advantageous for him to bring the whole before the court by way of answer, which he cannot do in the plea; for by the introduction of such matters in the answer, thereby showing an acquiescence on the plaintiff's part, the case of the latter is considerably weakened. The defendant must not evade the material facts in the bill which he is called upon to answer, but either confess or traverse the substance of each charge, otherwise the answer may be excepted to; and where the charges are set out distinctly and precisely, and are specially interrogated to, they must be answered distinctly and precisely, and not generally, although such general answer may amount to a complete denial of the charges.¹

By referring back to p. 257, it will be seen that formerly the bill was made to consist of nine parts; therefore, until the 15 & 16 Vict. c. 86, s. 10, the interrogatories for the examination of the defendant, upon which he had to found his answer, were embodied in the bill of complaint, and these interrogatories were based upon the allegations contained in the bill; but now, by virtue of the above Act, the bill itself is not to contain any interrogatories for the examination of the defendant, but shall contain, as concisely as may be, a narrative of the material facts on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief.

¹ Mitf. 310.

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Formerly, all the defendants to the suit, although mere formal parties, were required to answer the bill, except in the case where no direct relief was sought against a defendant. The expense and delay necessarily attendant upon this practice, occasioned it to be enacted, in accordance with the recommendation of the Chancery Commissioners (pp. 25-41), that the plaintiff in any suit commenced by bill may, if he require an answer from any defendant thereto, file, in the record office of the court, interrogatories for the examination of the defendants, or such of them from whom he may require an answer, and deliver to the defendant or defendants, so required to answer, or his or their solicitor, a copy of such interrogatories, or of such of them as shall be applicable to the particular defendant or defendants; and no defendant shall be called upon, or required to put in any answer to a bill, unless interrogatories shall have been so filed, and a copy thereof delivered to him or his solicitor within a time to be limited, or within such further time as the court shall think fit to direct (sect. 12).

The object of this section is to keep the facts and evidence distinct,^m therefore in the bill it is not necessary to aver the possession of documents in order to ground an interrogatory as to that fact.ⁿ

The provision of this Act, therefore, renders it optional with the plaintiff, whether he will require an answer from the defendant or not. But should the defendant not be required to answer, and does not answer, he shall be deemed to have traversed the case made by the bill (sect. 26). Of the traversing note we shall speak presently. The effect of the defendant not answering, however, is, that he will be considered to have denied the allegations in the bill, and the plaintiff must now support his case

^m Per V. C. Wood, *Perry v. Turpin*, 23 Law Times, 87.

ⁿ Ibid.

by entering into evidence. And it is provided by 16th Ord., 7th August, 1852, 1st set, that in cases in which the plaintiff requires an answer to his bill from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants are to be filed within eight days after the time limited for the appearance of such defendant or defendants (11 Cons. Ord. r. 2). But after the above time for filing interrogatories, none are to be filed without special leave of the court, to be applied for upon notice of motion (*id.* 20; 11 Cons. Ord. r. 3). And it has been held that where, under section 6 of the 15 & 16 Vict. c. 86, a written copy of the bill has been filed, the plaintiff is at liberty to file his interrogatories without waiting until he has filed a copy of the bill.^o

The interrogatories may be in a form similar to the form set out in schedule C. to the Orders 7th August, 1852, and according to schedule B. in 11 Cons. Ord. r. 1; with such variation as the nature and circumstances of each particular case may require (15 Ord. *id.*). The examination by means of interrogatories may extend to any documents within the defendant's possession although the bill does not contain any charge to that effect. The interrogatories are usually prepared and signed by counsel. One set of interrogatories will suffice, although there may be several defendants; the note at the foot is similar to that which had been by Orders 17 and 18, August 26, 1841, introduced into the bill, specifying the particular interrogatories which each defendant is required to answer.

By the 38th Order, 26th August, 1841, a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which

^o *Lambert v. Lomas*, 9 Hare, Append. 29; 16 Jur. 1008; *Perry v. Turpin*, 18 Jur. 594.

CHAP. X. he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer (15 Cons. Ord. r. 4).

Under this order it has been decided that the defendant shall not be deprived of the benefit to be derived from it, although the time for demurring has expired.^p And it applies as well to a case where a demurrer constituting the protection must have been a demurrer to the relief, as where it would have been a demurrer to the discovery only;^q and also where the bill is demurrable merely for want of parties, as to those in which it is demurrable for want of equity.^r

Ancient
order of the
court.

By one of the old orders of the court, where a bill charges a matter as the defendant's own act, his answer thereto must be direct, without saying it is to his remembrance, or as he believeth, if it be laid down within the seven years next previous; and if the defendant deny the charge, he must traverse it directly, and not by of negative pregnant. "As, if a fact be laid down to be done with divers circumstances, the defendant may not traverse it literally, as it is laid in the bill, but must traverse the point of substance; so, if the defendant be charged with the receipt of £100, he must traverse that he hath not received £100, or any part thereof; and if he hath received part, he must set forth what part"^s (see also 15 Cons. Ord. r. 1).

When cause
set down
upon bill and
answer.

If the plaintiff be satisfied with the statements and admissions contained in the defendant's answer, he may at once set the cause down to be heard upon the bill and answer; but should he be advised that the answer does not

^p *Drake v. Drake*, 2 Hare, 647; 8 Jur. 642.

^q *Tipping v. Clarke*, 2 Hare, 383.

^r *Kay v. Wall*, 4 Hare, 127, 283; 9 Jur. 128, 684.

^s Sand. Ord., 16 Jac. I., 29th Jan. 1618.

fully confess or avoid, traverse or deny, the material parts of the bill, he may except to the same for insufficiency, and, for this purpose, he states such parts of the bill as he conceives are not answered, and prays that the defendant may thereto put in a full answer. The exceptions require to be signed by counsel, and must, by Order 16, 8th May, 1845, art. 22, be filed within six weeks after the filing of the defendant's answer, otherwise the answer will be deemed sufficient* (16 Cons. Ord. r. 6).

It has been held that nothing which may be considered to be relevant to the plaintiff's case is *scandalous*. Thus, where a creditor filed his bill against the debtor's executrix and her husband, stating that the defendant and his wife were persons of bad character, of drunken habits and violent behaviour, and in a state of great poverty, and stating various particulars in support of those allegations, moreover that the husband had said that he was willing to perjure himself if he could get anything by it, and praying that the assets might be administered under the discretion of the court and for an injunction or receiver, it was held that the general statement and the instances were relevant to the relief called. It being material in a question about the administration of assets to make out that the person who has the power over and the management of them is a person of violent conduct and

Relevant
matter.

* The times of vacation shall not be reckoned in the computation of the times appointed or allowed for the following purposes:—

- (1) Amending or obtaining orders for leave to amend bills.
- (2) Filing or setting down exceptions for scandal or insufficiency, in cases where the time is not limited by notice given pursuant to the 6th rule of Cons. Ord. 42.
- (3) Setting down pleas and demurrers.
- (4) Filing replications or setting down causes under the 12th rule of Cons. Or. 33, in cases where a defendant puts in an answer to amendments, to which the plaintiff has not required an answer (37 Cons. Ord. r. 13).

CHAP. X. drunken habits, and therefore such statements were no scandalous.^t But it would seem, from Lord Langdale's opinion, in *Williams v. Douglas*, 5 Bea., that it lies upon the party inserting the matter complained of as scandal to show that it is material. A defendant shall not be bound to answer any statement or charge in the bill unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any of the interrogatories for the examination of the defendants, except those interrogatories which such defendant is required to answer. And where a defendant answers any statement or charge in the bill to which he is not interrogated only by stating his ignorance of the matter so stated or charged, his answer will be deemed impertinent (26th Aug. 1841, Ord. 16; 15 Cons. Ord. r. 3).^u

Where the defendant has pleaded or demurred to one part of the bill which seeks a discovery, and answered the remainder, the plaintiff, by taking exceptions to the answer before the plea or demurrer is answered, admits the plea or demurrer to be good, but not so if the plea or demurrer extend only to the relief prayed for by the bill.^v

A defendant by his answer denying or not admitting an agreement, may avail himself of the Statute of Frauds, although he may not have referred to it in his answer.^w

Practice as to reading a document referred to in defendant's answer.

There is a rule which prevails in the courts of law, that, where a party produces a document which he has obtained by means of a defendant's answer to a bill of discovery only, the party shall not be allowed to read a portion merely of the answer, or the evidence thereby obtained, without reading the whole answer, unless a

^t *Everett v. Prythergch*, 12 Sim. 365.

^u *Gordon and Company v. Governor and Company of Bank of England*, 4 Law Times, 371.

^v Mitf. 317.

^w *Ridgway v. Wharton*, 2 Week. Rep. 137.

court of equity in which the bill was filed has interfered and ordered the document to be produced and read. This arises from the respect which a court of law pays to the order of the court of equity, in not allowing a document obtained through the intervention of the latter tribunal to be read alone, without inquiring into the grounds of the order.^x

Also, when the cause comes on for hearing, it is the practice, that, whenever there is a passage in an answer relating to one part of the subject, and there is another passage in the answer relating to another part of the same subject, not in the same sentence, but connected in meaning with the first passage, and the plaintiff reads one of those passages as evidence, the court will compel him to read all other passages in the answer which are explanatory of the passage read, whether such other passages are connected in grammatical construction, or separated by passages relating to distinct subjects.^y

Practice also at the hearing, as to reading part of answer.

The answer of one defendant cannot be read against another defendant,^z because there is no issue between the parties, and no opportunity is given of cross-examination,^a except in an interpleader suit.^b And also in the case of partnership liability arising from the privity and community of interest, each partner for such purpose being the agent for the other.^c

One answer may in some cases be used against another, One answer

^x *Brown v. Thornton*, 1 My. and Cr. 248.

^y *Freeman v. Tatham*, 7 Law Times, 177.

^z *Jones v. Turbeville*, 2 Vea. 11; 4 Bro. C. C. 115; *Morse v. Royal*, 12 Vea. 361.

^a *Chervot v. Jones*, 6 Madd. 268; *Parker v. Morrell*, 2 Ph. 453; 12 Jur. 253.

^b 2 Eq. Ca. Ab. 67; 1 Smith, Ch. Prac. 454; *Angel v. Haddon*, 16 Ves. 203; *Bowyer v. Pritchard*, 11 Pri. 110; *Green v. Pledgar*, 3 Har. 165.

^c Stark. Evid. edit. 1853, p. 443.

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—
read against
another
answer, not
to affect a
decree.

so as to produce some influence on the judge's mind ; but certainly not as evidence on which to found a decree.^d But there are some answers which, even against the defendants themselves, are of no use as evidence. The answer of an infant, for example, is not binding upon him. This arises from his presumed incapacity for managing his own affairs. His answer is therefore put in and sworn to by his next friend.^e When also a married woman answers jointly with her husband, it cannot be read against him, although it may be sufficient as evidence against her, should she survive.^f

Generally speaking, defendants to a suit in the same interest should put in a joint answer ; but there is no rule of court which renders it compulsory.^g The mere difference of residence alone is not sufficient to justify the parties in severing.^h

Answer
signed by
counsel.

The signature of counsel is essential to an answer. The defendant's answer is sworn by him at the office of the clerk of the records and writs, and also pleas, answers, affidavits, or affirmations, whereon to ground process of contempt. This is required to identify the answer which he has sanctioned by his oath, and more especially to render a conviction for perjury more easy.ⁱ

Affidavits or affirmations required to be annexed to bills, may be sworn, affirmed, or attested upon honour before any clerk of records and writs, or before the clerk of enrolments in chancery (7 Ord., 26th Oct. 1842 ; 1 Cons. Ord. r. 39).

^d Per M. R., in *Hawks v. Howard*, 10 Law Times, 3. See further, *Stephens v. Heathcott*, 8 W. R. 336 ; 29 L. J. Ch. 529 ; 36 L. T. 112 ; 6 Jur. N. S. 312.

^e 2 Ventr. 72 ; Carth. 79 ; Comb. 156 ; *Wrottesley v. Bendish*, 3 P. Wms. 237 ; 3 Swan. 392.

^f *Wrottesley v. Bendish* ; *Shelberry v. Briggs*, 2 Vern. 249 ; 3 Atk. 648.

^g *Greedy v. Lavender*, 18 Law Jour. 62.

^h *Far v. Sheriffe*, 10 Jur. 630.

ⁱ 1 Newl. Ch. Pr. 132.

Under the 27th Order, 3rd April, 1828, and 40th Cons. CHAP. X.
 Ord. r. 12, where the same solicitor is employed for two Solicitor for
 or more defendants who have filed separate answers, the two separate
 taxing-master shall, in his discretion, in the taxation of defences.
 the solicitor's costs, consider whether such separate an-
 swers were necessary or proper; and if he be of opinion
 that the costs thereby occasioned are improperly in-
 curred, he shall disallow them.

Formerly, when a defendant happened to reside in the
 country, *i. e.* beyond twenty miles from London, his an-
 swer was taken before commissioners appointed for that
 purpose; but now the whole machinery as to taking
 answers, etc., *within* the jurisdiction is at once swept
 away, although the practice still exists as to the neces-
 sity of taking answers, etc., out of the jurisdiction in
 places where there is no properly constituted person
 having authority to administer oaths or taking affirma-
 tions; for by the 21 and 22 sects. 15 & 16 Vict. c. 86, the
 practice of the said court, of issuing commissions to take Practice of
 pleas, answers, disclaimers, and examinations in causes issuing com-
 and matters pending in the said court shall, with respect missions to
 to pleas, answers, disclaimers, and examinations taken take an-
 within the jurisdiction of the court, be and the same is swers, etc.,
 hereby abolished; and any such plea, answer, disclaimer, within the
 or examination may be filed without any further or other jurisdiction
 formality than is required in the swearing and filing of of the court
 an affidavit (sec. 21). abolished.

All pleas, answers, disclaimers, examinations, affidavits, Pleas, de-
 declarations, affirmations, and attestations of honour in clarations,
 causes or matters depending in the High Court of Chan- etc., in
 cery, and also acknowledgments required for the purpose Chancery,
 of enrolling any deed in the said court, shall and may be how to be
 sworn and taken in Scotland or Ireland, or the Channel sworn and
 Islands, or in any colony, island, plantation, or place taken in
 under the dominion of her Majesty in foreign parts, be- Scotland,
Ireland, the
Channel is-
lands, etc.

CHAP. X. fore any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of her Majesty's consuls or vice-consuls in any foreign parts out of her Majesty's dominions; and the judges and other officers of the said court of chancery shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, public, person, consul, or vice-consul attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in the said court (sec. 22).

From these last-mentioned sections it will be seen that a commission will seldom be required or had recourse to; but whenever it shall be necessary, the plaintiff will be at liberty to join in the commission for the purpose of seeing the answer taken, and two days' notice in writing must be given to the plaintiff's solicitor to give commissioners' names, to see it taken, and in default thereof the defendant may sue out the same directed to his own commissioners (9th Ord., Dec. 1833). Should the plaintiff wish to join in the commission, he must, within two clear days after service of the notice, furnish the defendant's solicitor with the names of one or two commissioners to act on his behalf, or in default thereof the commission will be directed to the defendant's own commissioners.

The writ must be prepared by the defendant's solicitor, and indorsed with the name and address of the solicitor or other party issuing it (Orders 16, 17, and 20; Oct. 1842; 3 Cons. Ord. rr. 1, 2, 5), as previously directed with respect to a bill, and also with the words "By the Court." It must then be sealed by the clerk of the records and writs (id. 4), as directed with respect to an

attachment, and at the same time a præcipe must be left with him. By 43rd Ord., May, 1845, all commissions to take answers must be made returnable without delay.

Upon issuing the commission it is forwarded, together with the answer and all necessary instructions, to one of the defendant's commissioners to be executed.

If the plaintiff join in the commission, he is entitled to six days' notice of executing it. This notice must be signed by the defendant's commissioners; it is then served on the plaintiff's commissioners. Should the plaintiff's commissioners neglect to attend, the defendant's commissioners may proceed to execute the commission *ex parte*. The commission however requires not less than two commissioners for its execution; and it is now enacted, that in future pleas, answers, or examinations, whether taken by commission out of the jurisdiction of the court or otherwise, may be filed without the oath of a messenger (15 & 16 Vict. c. 86, sec. 25).

It is a general rule in equity that, if the answer of the defendant (which is usually put in upon oath) contain a positive denial of the statements contained in the bill, and is contradicted by nothing more than the positive assertion of one witness only, the plaintiff shall not have a decree; for the rule of evidence allowed by the court gives the defendant, in a great degree, the protection of his own conscience. But where the circumstances of the case so preponderate as to outweigh this rule, the court will give a greater degree of credit to the evidence of a single witness than to the positive denial contained in the defendant's answer.^j Hence the advantage which a defendant sometimes has when the bill imputes to him fraud.

Answer to
be preferred
to oath of
witness.

^j East India Company *v.* Donald, 9 Ves. 283; Le Neve *v.* Le Neve, 3 Atk. 649; Janson *v.* Rany, 2 Atk. 140; Arnott *v.* Biscoe, 1 Ves. 97; Evans *v.* Bicknell, 6 Ves. 184. *Vide* also Spence, Eq. Jur. 625; Gres. Evid. 226-7.

CHAP. X.

Answer of
defendant,
on motion
for injunc-
tion or re-
ceiver, etc.,
to be re-
garded as an
affidavit.

Under the 59th sec., 15 & 16 Vict. c. 86, upon application by motion or petition to the court in any suit depending therein for an injunction or a receiver, or to dissolve an injunction, or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto (sec. 59).

Answer of
peers,
quakers,
corpora-
tions, and
foreigners.

Peers of the realm do not answer upon their oath but upon their honour, and a quaker answers upon his solemn affirmation. A corporation aggregate answer under their common seal and not upon oath. In the case of a foreigner, if he answer in his own language, it is necessary to file a sworn translation with it.^k

When taken
without
oath.

If the suit be a friendly one, the answer may be put in without oath, or without the signature of the defendant, which is done by order obtained upon motion or petition of course, with consent of the plaintiff, which consent is signed by his solicitor (16th Ord., 26th October, 1842; 3 Cons. Ord. rr. 1, 2).

Answer by.

It has been before stated that an infant sues by his next friend; but his answer is taken by a guardian, who is appointed by the court, who assign him a fit person as his guardian *ad litem*. Idiots and lunatics, if found so by inquisition, answer by their committees; but if no inquisition has been had, they answer by their guardian appointed for that purpose. If an infant happen to be a married woman, the joint answer of herself and husband will not be received until a guardian has been appointed.^l

Not usual to
amend
answer.

It is not usual, when once the answer is filed, for the court to grant leave for the defendant to amend it. He must apply for leave to put in a supplemental answer, and for this purpose a notice of motion must be given,

^k *Simmonds v. The Countess du Barre*, 3 Bro. 263.

^l *Colman v. Northcote*, 2 Hare, 147; 7 Jur. 528.

accompanied by an affidavit, that the defendant, when he put in his original answer, did not know the circumstances upon which he makes the application, or any other matter upon which he ought to have stated the fact in a different manner.^m

Formerly the defendant was allowed six weeks after appearance to plead, answer, or demur (not demurring alone) to any original or supplemental bill to which an answer was required; but this time, through the recommendation of the Chancery Commissioners, has been considerably abridged (Rep. pp. 25, 41). And thus it is enacted that, whether the plaintiff in any suit commenced by bill does or does not require any answer from the defendant, or any one or more of the defendants to the bill, such defendant or defendants may without any leave of the court put in a plea, answer, or demurrer to the plaintiff's bill within the time now allowed to the defendant for demurring alone to a bill, or within such other time as shall be fixed by any general order of the lord chancellor in that behalf; but after that time, a defendant or defendants, not required to answer the plaintiff's bill, shall not be at liberty to put in a plea, answer, or demurrer to the bill without leave of the court (15 & 16 Vict. c. 86, s. 13).

It will be observed, that if the defendant is not required to answer, but still wishes it, he must do so within twelve days, the period formerly allowed him to demur to the bill, not demurring alone.

A defendant *required* to answer a bill must put in his plea, answer, or demurrer thereto, not demurring alone, within twenty-eight days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer; but the court shall have full power to enlarge the time from time to time upon application being

^m 8 Ves. 79; 2 Ves. and Beav. 163.

CHAP. X. made to the court for that purpose (19th Ord. 7th Aug. 1852, 1st sec. 37 Cons. Ord. r. 4).

Court or judge may order defendant to procure documents, etc., on oath.

It shall be lawful for the court, upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just (sec. 18).

Upon application of defendant, after answer, plaintiff may be required to produce documents on oath.

It shall be lawful for the court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just (sec. 20).

Time for answering, sometimes extended.

The defendant may sometimes obtain a longer time for the purpose of putting in his answer than that which is allowed by the strict practice of the court. This was formerly done by petition or motion; but by the statute 3 & 4 Will. IV. c. 94, s. 13, it was enacted that the masters in ordinary shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend the bill, and for enlarging publication, and all such other matters relating to the conduct of suits in the

said court, as the lord chancellor, with the advice, etc., shall direct.

Under the 15 & 16 Vict. c. 80, the judges in chancery have agreed that all applications for the above purposes shall be made at chambers.

The power of the court to grant further time for pleading, answering, or demurring to any bill upon the application of any defendant or defendants thereto, whether required to answer the bill or not, shall remain in full force, and shall not be in anywise prejudiced or affected; and if the court shall grant any further time to any defendant for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree under the provisions thereafter contained, shall in the meantime be suspended (15 & 16 Vict. c. 86, s. 13).

Where under an order allowing a defendant further time to answer, it is intended that the defendant shall be limited to putting in an answer only, it should be so specified in the order, otherwise the defendant may file a plea.ⁿ

The answer may be in form similar to that set out in schedule D, to the Orders of 7th August, 1852, and according to schedule C, in 15 Cons. Ord. r. 1, with such variations as the nature and circumstances of each particular case may require (see Ord. 21, 1st section); and by sec. 14 of 15 & 16 Vict. c. 86, it is enacted that the answer of the defendant to any bill of complaint in the said court may contain, not only the answer of the defendant to the interrogatories so filed as aforesaid, but such statements material to the case as the defendant may think it necessary or advisable to set forth therein, and such answer shall also be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct statement or allegation (sec. 14).

Defendant's answer may contain not only answer to interrogatories, but statements material to his case.

ⁿ Hunter v. Nockolds, 2 Phil. 540; 12 Jur. 149.

CHAP. X.

Application
for leave to
examine
witnesses,
how made.

It may be remarked that, although an application for leave to *examine witnesses*, and to enlarge the time for closing evidence, may seem to come within the letter, yet it does not fall within the meaning of the Act; and therefore, as applications of this sort are often most special in their circumstances, a motion for that purpose ought to be made to the court in the first instance.^o Where, also, the object to amend is by *striking out the name of a plaintiff*, application must be made to the court in the first instance, as the jurisdiction at chambers in applying for leave to amend is confined to those cases only where a mere amendment is required, and not where the result of the application would be to alter the defendant's security with respect to costs.^p Before a cause is heard, the usual application to amend the record by adding parties is to the judge at chambers. If however when a cause comes to a hearing it appears to be necessary that other parties should be added, the court will adjourn the cause, and give leave to amend by adding such parties; and if in making the amendment it be found requisite to add parties not contemplated by the court, leave to make such further amendment must be obtained from the court which has granted the former permission.^q

IV. DISCLAIMER.

Disclaimer
put in when
defendant
has no title.

If the defendant claim no right or title to that which is made the subject of demand by the plaintiff's bill, he may disclaim or renounce all pretence of title to such matter. A disclaimer, when accompanied by his answer, is put in upon oath of the defendant, and must be signed by him; and, notwithstanding it is, strictly speaking, dis-

^o Carr v. Appleyard, 2 My. and Cr. 476.

^p Read v. Treacher, 2 Keen, 318.

^q Biedermann v. Seymour, 2 My. and Cr. 117.

tinct from an answer, yet it cannot often be filed alone, but is usually put in under the title of an answer. For, although the defendant may not, at the time he disclaims, possess any interest in the matter, yet he might have had an interest which he has parted with, and this circumstance it seems would entitle the plaintiff to an answer as to the certainty of the fact. The form of a disclaimer simply would be, that the defendant disclaims all right and title to the matter in demand. A defendant who disclaims may be examined as a witness by a co-defendant,^r although the plaintiff could not take advantage of such defendant's evidence, in proof of his own right, to the prejudice of another defendant.^s But the 6 & 7 Vict. c. 85, provides that, in courts of equity, any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions.

Generally speaking, when the bill alleges simply that the defendant claims some interest in the property in dispute, and the defendant says that he claims no interest,—or, in other words, puts in a simple disclaimer,—that is a sufficient answer to the allegation; for it removes the only ground on which he was made a party to the suit; but where the bill, in addition to the allegation of interest, states other facts which seek to charge the defendant with a liability, or where it contains various allegations tending to show that he had rendered the suit necessary by his personal conduct, and prays that he may pay the costs of the suit, it is not sufficient that such defendant puts in a mere disclaimer, but he must answer the bill fully.^t

Should there appear any inconsistency between the answer and disclaimer, the matter will be taken more

Effect of
inconsis-
tency

^r 7 Ves. 267.

^s 2 Atk. 39.

^t *Graham v. Cape*, 9 Sim. 93.

CHAP. X.
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between
answer and
disclaimer.

strongly against the defendant upon the disclaimer than upon the answer, since it is only by the latter that the truth of the defendant's title can be ascertained. In the case of a general disclaimer by the defendant, the bill is usually dismissed against him with costs.^u And should a defendant disclaim all interest in the suit at the bar, yet if there be any question whether he has documents relating to the suit in his possession which ought to be delivered up, the court will retain him upon the record and direct an inquiry upon the subject.^v

^u *Gabriel v. Sturgis*, 10 Jur. 215.

^v *Teed v. Carruthers*, 2 You. and Col. 31.

CHAPTER XI.

EXCEPTIONS TO ANSWER.—WHEN ANSWER IS DEEMED
SUFFICIENT.—AMENDMENT OF PLAINTIFF'S BILL.—
TIME ALLOWED TO AMEND.—DISMISSING A BILL FOR
WANT OF PROSECUTION.

THE defendant having filed his answer, the plaintiff, if he be advised that it contains any matter altogether unnecessary or irrelevant to the subject of the suit, may refer the same for scandal; and, if reported as such, the scandal will be ordered to be expunged from the record: he may also except for insufficiency, which must be done within a limited time, otherwise the answer will be taken to be sufficient.

Scandal is anything alleged in the bill, answer, or other pleading, in language which is unbecoming the court to hear, or contrary to good manners;^a or anything set forth which charges a person with a crime not necessary to be shown in the cause. Scandal.

Impertinence is where the pleadings are stuffed with long recitals, or where they consist of digressions as to matters of fact, which are altogether unnecessary and totally immaterial to the point in question.^b Impertinence.

Before the passing of the 15 & 16 Vict. c. 86, the plain-

^a Doc. and Stud. b. ii. c. 38.

^b Wyatt's P. R. 383.

CHAP. XI.

Practice of
excepting to
bills, an-
swers, etc.,
for imperti-
nence, abo-
lished.

Proviso as to
costs.

tiff might file his exceptions for impertinence as well as for insufficiency of answer; but impertinent matter being in a technical point of view regarded only as redundancy or matter which is merely surplusage, it is now only to be considered with reference to costs, for it is by the 17th section enacted that the practice of excepting to bills, answers, and other proceedings in the said court, for impertinence, shall be and the same is hereby abolished: Provided always, that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the said court to be paid by the party introducing the same, upon application being made to the court for that purpose.

It is no new thing, and precedents may be found, where the court has ordered counsel to pay the costs of expunging any impertinent matter from the record out of his own pocket. And in this case it makes counsel more careful how they stuff bills, or answers, or other records, with tautology and impertinency.*

* Mr. Spence, who appears to have explored and made himself familiar with the long-forgotten catacombs of legal antiquity, gives rather a singular description of the punishment inflicted in the time of Queen Elizabeth, by the court, upon an individual who, acting as his own pleader, fell into the same dilemma, and found the same description of person for his client, which in more modern times a man who becomes his own lawyer seldom fails of obtaining. The author trusts that he may be excused if he take advantage of his labours in setting out, *verbatim*, his entertaining note (Eq. Jur. 376 n. (e) :—

“Between William Mylward, *Plaintiff*, and William Weldon and another, *Defendants*;

“And between William Weldon, *Plaintiff*, and William Mylward, *Defendant*.

“8th February, 1596.

““And whereas Richard Mylward, the plaintiff’s son, did confess that he himself did heretofore draw the long replication of six score sheets of paper, which heretofore was put into the court by the plain-

Whether the answer be filed in term time or vacation, CHAP. XI.
 the plaintiff is allowed six weeks from such filing, within Time for
 which he may file his exceptions for insufficiency, not excepting.
 computing the several periods between the vacations, as

tiff to the answer of the defendants; in which replication much impertinent and idle matter was inserted, as it heretofore seemed to his Lordship, of purpose to put the defendants to extraordinary charges, and that he used no advice of counsel therein: It is ordered by his Lordship, that the said Richard Mylward be forthwith committed to the prison of the Fleet for his misdemeanour and abuse offered to this court.'—Reg. Lib. A. 1596, fol. 667.

“*Same Cause*, 10th February, 1596.

“‘Forasmuch as it now appeared to this court by a report made by the now Lord Keeper, being then Master of the Rolls, upon consideration had of the plaintiff’s replication according to an order of the 7th of May, of anno 37 Regiæ, that the said replication doth amount to six score sheets of paper, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper, wherefore the plaintiff was appointed to be examined to find out who drew the same replication, and by whose advice it was done, to the end that the offender might, for example’s sake, not only be punished, but also be fined to her Majesty for that offence; and that the defendant might have his charges sustained thereby (the execution of which order was, by a later order made by the late Lord Keeper the 26th of June, anno 37 Regiæ, suspended, without any express cause showed thereof in that order, and was never since called upon until the matter came to be heard on Tuesday last, before the Lord Keeper, at which time some mention was again made of the same replication); and for that it now appeared to his Lordship, by the confession of Richard Mylward, *alias* Alexander, the plaintiff’s son, that the said Richard himself did both draw, devise, and engross the same replication, and because his Lordship is of opinion that such an abuse is not in any sort to be tolerated, proceeding of a malicious purpose to increase the defendant’s charge, and being fraught with much impertinent matter not fit for the court: It is therefore ordered, that the warden of the Fleet shall take the said Richard Mylward *alias* Alexander into his custody, and shall bring him into Westminster Hall on Saturday next, about ten of the clock in the forenoon, and then and there shall *cut a hole* in the midst of

CHAP. XI.

mentioned in a note in the previous chapter.^c The plaintiff is allowed the same time to except to an answer to an amended bill as to the answer to an original bill, although such answer is also a further answer to the original bill.^d

At the expiration of eight days from the filing the exceptions to the defendant's answer, but not before (unless in a case of election he is required by notice in writing from such defendant to set them down within four days of such notice, pursuant to Order 13, 2nd November, the same engrossed replication, which is delivered to him for that purpose, and *put the said Richard's head through the same hole*, and so let the same replication hang about his shoulders with the written side outwards, and then, the same so hanging, shall *lead the said Richard bareheaded and barefaced round about Westminster Hall*, whilst the courts are sitting, and shall show him at the bar of every of the three courts within the hall, and then shall take him back again to the Fleet, and keep him prisoner until he shall have paid £10 to her Majesty for a fine, and twenty nobles to the defendant for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this court for the abuse aforesaid.'—Reg. Lib. A. 1596, fol. 672. Sir J. Puckering, Lord Keeper."

This practice of doing legal penance did not expire with the sixteenth century; for it appears to have been extended down to the year 1737, when one Robert Nixon, a nonjuring clergyman, for having caused an explosion of gunpowder in Westminster Hall, during the sittings of the courts, and by that means scattering about several treasonable papers, of which he was the author, printer, and publisher, was sentenced to make the tour of Westminster Hall, and to go into the four courts with a paper or parchment on his forehead declaring his offence, and pay a fine of two hundred marks; to suffer five years' imprisonment; and to find sureties for his good behaviour, himself in £500, and two sureties of £250 each. He went through the first part of his sentence 10th February of that year, and was then remanded back to Newgate.—Harris's Life of Lord Hardwicke, vol. i. p. 326.

^c Order 16, 8th May, 1845, art. 22, and Order 4, 2nd Nov. 1850; 37 Cons. Ord. r. 13, art. 1, 2, 3, 4.

^d Lloyd v. Clark, 7 Jur. 568.

1850; 42 Cons. Ord. r. 6), the plaintiff must set them down for hearing after the eight days, but within fourteen days from the filing of such exception; but if he does not do so within the fourteen days, the answer is to be deemed sufficient (*id.* Ord. 14; 16 Cons. Ord. r. 12).

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Reference
to master
for insuffi-
ciency.

The eight days which must elapse between the expiration of the six weeks before mentioned, when the exceptions are filed, and setting them down for hearing, are allowed the defendant to determine whether he will submit to answer such exception. Should the defendant, not being in contempt, submit to exceptions to his answer for insufficiency before the plaintiff has set them down for hearing, he is allowed fourteen days from the date of the submission, within which he is to put in his further answer (Ord. 10, 2nd Nov. 1850; 16 Cons. Ord. r. 9). After the defendant has filed his second and third answer, which the plaintiff considers insufficient, he must, within fourteen days (Ord. 16, 2nd Nov. 1850; 16 Con. Ord. r. 13) from the time when it was filed, set down the old exceptions, or the answer will be deemed sufficient.

Why eight
days given
before order
of reference.

1st. Although an answer may in itself be insufficient, yet it shall be deemed sufficient if the plaintiff do not except thereto within six weeks from the day on which it is filed, not accounting the interval between the seal days or vacations.

2nd. If the plaintiff except, but do not set down the exceptions for hearing within the fourteen days from filing the same.

3rd. If within fourteen days after filing a further answer the plaintiff does not set down the old exceptions (Ord. 18, 2nd Nov. 1850; 16 Cons. Ord. r. 16, art. 1, 2, and 3).

Exceptions to answers for insufficiency are to be set down for hearing by the registrar, at the request of the party filing the same, upon the production of a certificate

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of the clerk of the records and writs of the filing of such exceptions, or (in the case of exceptions of an answer for insufficiency) of the filing of a further answer, and the same are to be advanced and put in the paper for hearing on an early day, and the party setting down any such exceptions, shall, on the day on which the same shall be so set down, serve a notice thereof on the party whose pleading or other matter is excepted to, otherwise the exceptions shall be deemed not set down (2nd Nov. 1850, Ord. 16; 12 Cons. Ord. r. 10).

If upon the hearing of exceptions the answer be held sufficient, it shall be deemed to be so from the date of the order made at the hearing; and if the defendant submit to answer without an order from the court, the answer shall be deemed insufficient from the date of the submission (2nd Nov. 1850, Ord. 20; 16 Cons. Ord. r. 18).

Where, after a defendant's second or third answer is filed, the plaintiff sets down the old exceptions for insufficiency, the particular exception or exceptions to which he requires a further answer shall be stated in the notice of setting down such exceptions (2nd Nov. 1850, Ord. 19; 16 Cons. Ord. r. 17).

Where after exceptions to an answer for insufficiency are set down for hearing, a defendant not being in contempt submits to answer, or where the court holds the first or second answer to be insufficient, the court may appoint the time within which such defendant shall put in his further answer (2nd Nov. 1850, Ord. 17, 21; 16 Cons. Ord. r. 14). And if he does not answer within the time so allowed or appointed, or obtain further time and answer within such further time, the plaintiff may sue out process of contempt against him (8th May, 1845, Ord. 27; 2nd Nov. 1850; 16 Cons. Ord. r. 15).

Effect of
Order, 8th
May, 1845.

Although an answer had been referred for insufficiency, it might afterwards have been referred for scandal;

for the court, ever anxious to keep its records pure, would not be made the medium of scandal, although the parties might, by their own act, have waived their right to except for impertinence.^e But it seems that this distinction in practice is intended to be abolished; for Order 24, 2nd November, 1850; 16 Cons. Ord. r. 20, declares that a party having filed his exceptions for *scandal* does not set the same down for hearing within six days after such filing, they are considered as abandoned, and the costs are to be paid by the exceptant.

In an anonymous case,^{f*} Sir John Leach, V.C., held that no application made by a stranger to the record to refer a bill for scandal could be supported, inasmuch as he could not take an office-copy of the bill for the master to decide upon the question of scandal; besides this, the party has his remedy at law, if he be libelled by the record, as well as by any other writing. The same learned judge, in pronouncing his judgment, said that he had conversed with the lord chancellor (Eldon), who had concurred with him in his opinion upon the subject.

Application
by a
stranger to
the record,
to refer for
scandal.

But upon a former occasion^g his Lordship seems to have been of a different opinion; wherein he not only held that one defendant might refer the answer of another defendant for scandal, although he did not recollect an instance of such an application by a defendant (such instances having occurred only upon the motion of plaintiff), but said he would not lay it down as a rule, that a person not a party to the record could not be heard upon such an application.

In *Williams v. Douglas*^h (referred to *ante*, p. 378), it

Williams v.
Douglas.

^e 2 Madd. 344.

^f 4 Madd. 252.

* This case, the name of which does not appear to have been known to Mr. Maddock at the time it was decided, appears from the Reg. Lib. to have been that of *Porter v. Evors, ex parte Morgan*.

^g *Coffin v. Cooper*, 6 Ves. 514.

^h 5 Beav. 82.

CHAP. XI. — was held that a stranger to the cause may, upon a special application to the court, except to and refer a pleading for scandal, although he cannot do so *ex parte*.

Effect of scandal.

In this case, the master of the rolls, alluding, doubtless, to the opinion expressed by Sir J. Leach in 4 Madd., said that it was a most serious matter to consider whether it be possible for a party to introduce on the record scandalous matter greatly prejudicial to a stranger to the suit, without the latter having an opportunity of applying to be relieved from the imputation, to the injury of his memory for ever. “Effectual justice,” said his Lordship, “to a person aggrieved by such scandal, cannot be obtained by means of an action, or any succession of actions. Whilst the record remains unaltered, there is scandal—a perpetual reproach and shame, for which no just damages can be assessed, no just compensation ever given, and which can only be removed by the authority of this court. I own that I cannot attribute much weight to the objection (which the court could, by its own order, so easily remove), that a person, not a party to the cause, has no right to an office copy of the bill. And I see no hardship in compelling a party, who has introduced into the record contumelious matter amounting to scandal, to show that it is material to the purpose of justice.”

Defendant, although in contempt, may except for scandal.

Although a defendant be in contempt for want of an answer, he may except to a bill for scandal, for, until the reference for scandal be disposed of, the defendant cannot tell what it is he is bound to answer.ⁱ

ⁱ Everett v. Prythergch, 12 Sim. 363.

CHAPTER XII.

AMENDMENT OF PLAINTIFF'S BILL.—TIME ALLOWED
TO AMEND.—DISMISSING A BILL FOR WANT OF PRO-
SECUTION.

WHENEVER there happens to be a disclosure of new facts, which, although they existed before the commencement of the proceedings, the plaintiff could not fairly be presumed to have been acquainted with at the time, but have come to his knowledge subsequent to filing the bill, either by his own exertions, or from any matter offered or confessed in the defendant's plea or answer, he may obtain leave to amend his bill, and frame it according to the newly-developed circumstances; he will not, however, be allowed, by such amendments, to alter the entire nature and substance of the record: when, therefore, any event has arisen subsequently to filing the bill, whereby a new title arises, that circumstance cannot be introduced by way of amendment, but must be made the subject of a supplemental bill, subject, however, to the alterations made by 15 & 16 Vict. c. 86, sec. 53 (*vide* Appendix).

The order to amend is, according to the peculiar circumstances of the case, obtained either, 1st, on motion or petition of course; 2ndly, on special application, formerly to one of the masters in ordinary, but now to the judge at chambers: this is by virtue of the 15 & 16 Vict. c. 80 (the Act for abolishing the master's jurisdiction); or, 3rdly, on special application to the court.

CHAP. XII.

The plaintiff having obtained an order for leave to amend his bill shall, in all cases in which no other time is limited by such order, have fourteen days after the date of the order within which he may amend his bill (Ord. 16, 8th May, 1845, art. 34; 9 Cons. Ord. r. 17).

If, after leave obtained, the plaintiff does not obtain an order to enlarge the time, and does not amend his bill within the time limited by the order to amend, or if no time be so limited, then within fourteen days from the date of such order, the order to amend shall be void, and the cause as to dismissal shall stand in the same position as if such order to amend had not been made (8th May, 1845, Ord. 16, art. 34, and Ord. 70 and 114; 33 Cons. Ord. r. 11).

When the plaintiff amends his bill without requiring an answer to the amendment, a defendant who has answered or has not been required to answer the original bill, but desires to answer the amended bill, must put in his answer thereto within fourteen days after the expiration of the time within which if an answer had been required he might have been served with interrogatories for his examination in answer to such amended bill, or within such further time as the judge shall allow (37 Cons. Ord. r. 7).

Any defendant may upon notice move to dismiss the bill with costs for want of prosecution, where the plaintiff after answer amends his bill without requiring an answer to the amendment, and having obtained no order to enlarge the time, does not file the replication or set down the cause to be heard on bill and answer, or set down a motion for a decree or decretal order, within the terms following:—

(1.) Within one week after the expiration of the time within which such defendant might have put in an answer, in cases where the defendant does not desire to answer amendments.

(2.) Within fourteen days after the refusal to allow further time, in cases where the defendant desiring to answer has not put in his answer within the time allowed for that purpose, and the judge has refused to allow further time.

(3.) Within fourteen days after filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff has within such fourteen days obtained a special order for leave to except to such answer or reamend the bill (33 Cons. Ord. r. 12, art. 1, 2, 3).

In every case where the plaintiff amends without requiring a further answer to the amended bill, it should be so stated in the order, otherwise it is irregular.^a

And under the new practice, where a defendant not being required to answer does answer notwithstanding, the plaintiff cannot obtain an order as of course for leave to amend after four weeks from the time of filing the answer.^b

It is necessary in all amended bills that the counsel should sign his name; and if he be the same who drew the bill, which is most likely to be the case, and a new engrossment or a reprint be required, he ought to erase his name as it formerly stood to the bill, and re-sign it to the amended bill. Where, however, no reprint is required, and the draft of the amended bill is signed by the same counsel who signed the draft to the original bill, there is no necessity that the counsel's name should be repeated; but if the amendment be made by another counsel, it seems that a second signature by that counsel will be required.^c

As to
counsel's
signature to
amended
bills.

^a *Boddington v. Woodley*, 9 Sim. 380.

^b *Rogers v. Fryer*, 2 Eq. Rep. 253; 2 Week. Rep. 67.

^c *Webster v. Threlfall*, 1 Sim. and Stu. 137; *Burch v. Rich*, 1 Russ. and My. 157; 1 Dan. Pr. 547 *n*.

CHAP. XII.

Amendment
of plaintiff's
bill, *before*
and *after*
answer.

The plaintiff is at liberty *before* answer to amend the record as often as he pleases, upon motion or petition, without notice,^d but *after* answer he is allowed one order only for leave to amend in the *usual form*; and afterwards no further leave will be granted before filing or undertaking to file his replication, unless the judge sitting in chambers shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved, and signed by counsel, and that they are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff. And no order to amend shall be made before filing, or undertaking to file, a replication, unless such order be obtained within four weeks after the answer, if there be only one defendant; or, where several defendants, they all join in the same answer—or after the last of the answers, if there be two or more defendants—is to be deemed sufficient, after which a special application must be made, grounded upon a further affidavit, showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.^e

The above-mentioned affidavits as to the necessity of the amendments are to be made by the plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff, from being abroad or otherwise, is unable to join therein (8th May, 1845, Ord. 69; 9 Cons. Ord. r. 16).

Clerical
errors,
names,
dates, etc.

This order does not extend to amendments which are made only for the purpose of rectifying some clerical error, or error in names, dates, or sums, and which may be

^d Bird *v.* Hulster, 1 Russ. and My. 325; Collingworth *v.* Grundy, 2 My. and K. 359; Ord. 64, 8th May, 1845; 9 Cons. Ord. rr. 8 and 9.

^e Ord. 13, 23rd Nov. 1831, and Ord. 16 (art. 32 and 33), 64 and 68, 8th May, 1845; 9 Cons. Ord. r. 68.

obtained at any time upon motion or petition without notice;^f neither are the words "last of the defendants" to be taken without qualification, since it is not the answer of every defendant that the court will wait for, as where for instance a defendant is out of its jurisdiction; for if the suit must be delayed because new defendants have not answered, the plaintiff, by adding new defendants to the record, might obtain any length of time.^g

After the plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time when the answer or the last of the answers required to be put in is to be deemed or is held to be sufficient, a special order for leave to amend a bill shall not be granted without further affidavit, showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill (8th May, 1845, Ord. 16 ; 9 Cons. Ord. r. 68).

But where, after a replication had been filed, the plaintiff had, on special leave, amended his bill in such a manner as to call for an answer, it was determined that he might afterwards obtain, as of course, a further order to amend at any time before the answer to the amended bill was filed.^h

The times of vacation are not to be reckoned in the computation of the time allowed the plaintiff for amending or obtaining orders for leave to amend his bill (Ord. 14, 8th May, 1845 ; 37 Cons. Ord. r. 13).

The effect of the plaintiff amending his bill is to prevent the defendant from moving to dismiss the bill for want of prosecution ; and by the 33 Cons. Or. r. 10, Art.1,

Times of
vacation not
reckoned.

Effect of
amending
plaintiff's
bill.

^f *Vide* Ord. 14, 23rd Nov. 1831, and Ord. 65, 8th May, 1845 ; 9 Cons. Ord. r. 9.

^g *Bartolacci v. Johnstone*, 2 Hare, 632 ; *Marquis of Hertford v. Suisse*, Rolls, 8 Jur. 117.

^h *Wharton v. Swann*, 2 My. and K. 362.

CHAP. XII. 2, and 3, any defendant may upon notice move that the bill may be dismissed with costs for want of prosecution, and the court may order accordingly:—

(1.) Where the plaintiff, having obtained no order to enlarge the time, does not, within four weeks after the answer or the last of the answers required to be put in by such defendant is held or deemed to be sufficient, or after the filing of a traversing note against such defendant, file the replication, or set down the cause to be heard on bill and answer, or set down a motion for a decree or decretal order, or obtain and serve an order for leave to amend the bill; or

(2.) Where the plaintiff, having undertaken to reply to a plea filed by such defendant to the whole bill, does not file his replication within four weeks after the date of his undertaking; or

(3.) Where the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a *subpœna* to hear judgment within four weeks after the evidence has closed.

The plaintiff, by amending after having excepted to defendant's answer, waives the benefit of the exceptions, unless he make a special application to amend without prejudice to such exceptions.

Where plaintiff admits sufficiency of defendant's answer.

If, after the defendant has answered, the plaintiff amend his bill otherwise than by adding parties, he is considered, by such amendment, as having admitted the sufficiency of the answer, and therefore he is precluded from afterwards excepting to the answer. Upon the same principle, if the plaintiff take exceptions to the answer, and they are submitted to or allowed, and he then amend his bill, he cannot take any new exception as to that part of the bill which has not been amended, unless the amendments vary the meaning of such part so as to make it part of the

amendment; for in this case the plaintiff, by excepting CHAP. XII. and then amending, admits the sufficiency of the answer, except that part of it to which the exceptions refer.ⁱ

If the plaintiff, as before stated, neglect to prosecute his suit within four weeks after the defendant's answer is deemed sufficient, or do not amend within the time, the defendant is at liberty, at the expiration of that period, to give notice of motion to dismiss the plaintiff's bill, with costs, for want of prosecution. Dismissing bill for want of prosecution.

In a suit against several defendants, any one of them is allowed, on his own behalf, to dismiss the plaintiff's bill without calling upon his co-defendants to join with him in an application to the court for that purpose. One plaintiff may also apply, as far as relates to himself, that the bill may stand dismissed, without the concurrence of the other co-plaintiffs, provided he do not thereby prejudice their claims.

In computing the time in which a bill may be dismissed on the ground that no prosecution has been taken since the answer was filed, the intervals between the seals are not to be reckoned.^j

If the plaintiff amend his bill, but by his order does not require the defendant to answer such amended bill, the defendant is at liberty, unless the plaintiff file his replication within fourteen days after the service of notice that his bill has been amended, to give notice of motion to dismiss the same for want of prosecution, provided he be in other respects in a fit position so to do.

ⁱ Taylor v. Bailey, 3 My. and Cr. 682.

^j Attorney-General v. Jones, 5 Sim. 246; Angel v. Wascomb, 1 My. and Cr. 48.

CHAPTER XIII.

THE REPLICATION.—MOTION FOR DECREE.

Replication. IF the plaintiff neither except to the answer for insufficiency, nor refer the same for scandal within the period allowed from the time of its being filed, he may *reply* to the defendant's answer, and serve a note on the defendant's solicitor stating that he has filed his replication. If the plaintiff do not reply, he thereby admits the truth of the matter contained in the defendant's answer, in which case he must either amend, or, within four weeks after the answer is to be deemed sufficient, proceed to set down the cause for hearing upon bill and answer only.

Effect of
setting
cause down
upon bill and
answer.

Should the plaintiff think fit to proceed no further in the pleadings, and is satisfied to set the cause down upon bill and answer only, he is bound by the statements in the answer as he finds them.* He can neither rely upon any matter not imported in the answer nor deny any facts stated therein. So that, where the cause is thus set down without any replication filed, the answer, so far as it goes,

* Admissions are either by the rules of pleading or by force of the terms in which they are expressed. They are of the former kind on the part of the defendant when he puts in his demurrer, and on the part of the plaintiff when he files no replication, but brings the cause to a hearing upon bill and answer.—Gresley's Evid. in Equity, p. 22.

is evidence in the defendant's own favour. But the whole answer must be read, and must be considered in all respects true. Where however the plaintiff has replied to the answer, it cannot be read by the defendant as evidence unless upon a question of costs.^a

Where there happens to be an infant plaintiff, the cause cannot be set down upon bill and answer; but the cause must be put in issue, and every fact alleged in the answer must be strictly proved.^b And it is the same in respect to an infant co-defendant, so far at least as his interest is concerned, unless the objections which he might take are waived by an arrangement among the solicitors on both sides.^c

Where the cause cannot be set down upon bill and answer by reason of the infancy of the plaintiff, the principle of the rule seems to be this, *i. e.* that as the answer cannot be read against an infant, the defendant ought not to be thereby excluded from the benefit of a replication, which would afford him an opportunity of going into evidence if he should think fit.

Upon the death of a defendant, unless the suit is revived, it is irregular to file a replication to the answer of such defendant.^d

15 & 16 Vict. c. 86, s. 15, enacts that the plaintiff in any suit commenced by bill shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the court, upon such notice as shall in that behalf be prescribed by any general order of the lord chan-

Plaintiff may, on expiry of time for answering, but before replication, move for a decree or decretal order.

^a *Vancouvre v. Bliss*, 11 Ves. 458; *Howell v. George*, 1 Madd. Rep. 1.

^b *Legard v. Sheffield*, 2 Atk. 377; *Thurston v. Nutten*, 3 P. W. 237 *n.*; *Cowdell v. Tatlock*, 3 V. and B. 19.

^c *Tillotson v. Hargreave*, 3 Madd. Rep. 494. *Vide* also *Gresley's Evid.* 2nd edit. 51.

^d *Deeks v. Stanhope*, 2 Week. Rep. 651; 23 Law Times, 341.

CHAP. XIII.

Affidavits
may be filed.

Issue may be
joined by
filing repli-
cation as at
present.

cellor, for such decree or decretal order as he may think himself entitled to ; and the plaintiff and defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion ; and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit. And section 26 also provides that in suits in the said court commenced by bill, where notice of motion for a decree or decretal order shall not have been given, or, having been given, where a decree or decretal order shall not have been made thereon, issue shall be joined by filing a replication in the form or to the effect of the replication now in use in the said court ; and where a defendant shall not have been required to answer and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill.

Where a defendant is not required to answer and does not answer the bill, so that under the statute 15 & 16 Vict. c. 86, s. 26, he is to be considered as having traversed the case made by the bill, issue shall nevertheless be joined by filing a replication in the form and to the effect of the replication set forth at the end of the Order 7th Aug. 1852, 1st Set, Ord. 28 ; 17 Cons. Ord. r. 1.

The object of the above section of the statute seems to be to provide against the chance of the motion for a decretal order failing.^e It is not necessary to file a replication pending such motion.^f

Dismissing
bill for want
of prosecu-
tion.

If the plaintiff be advised to file his replication to the defendant's answer, and omit to do so within the proper time, *i. e.* the four weeks lastly mentioned, the defendant

^e *Maniere v. Leicester*, 2 Eq. Rep. 306 ; 23 Law Jour. 263 ; 18 Jur. 320 ; 2 Week. Rep. 327.

^f *Duffield v. Sturges*, 9 Hare, Append. 87 ; 22 Law Jour. 288 ; 15 & 16 Vict. c. 86, s. 15.

is at liberty to serve him with a notice of motion to dismiss for want of prosecution, which fixes him with the costs of the application, and forces him to give an undertaking to speed the cause, *i. e.* to file his replication, which puts the cause completely at issue, without serving the subpoena to rejoin, as formerly was required for that purpose (Order 93, 8th May, 1845 ; 17 Cons. Ord. r. 2).

CHAP. XIII.
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CHAPTER XIV.

EVIDENCE.

Examination
of witnesses.

THE matter being now at issue, the parties may proceed to the next step in the cause, *i. e.* that of entering into evidence for the purpose of substantiating the truth of the allegations adduced in the pleadings of either party. This is effected by each side obtaining the best evidence he is able, so far as it is material to support his case, which was formerly done by means of interrogatories drawn and signed by each party's counsel,^a for the examination of his witnesses, whose depositions were taken down in writing by an examiner at the Examiner's Office, in Rolls Yard. Parties answering to interrogatories as witnesses were previously sworn by the examiner; and it was the same with a peer when he was examined as a witness. A witness objecting to answer any interrogatory put to him did so by demurrer, which was taken down at the time by the examiner.

There are now four methods by which a party may sustain his case:—

1. By the evidence contained in the pleadings.
2. By evidence produced from oral examination.
3. By documentary evidence.
4. By evidence from affidavits.

^a Per Jeffreys, C., 29th April, 1687; Sand. Ord. 375.

1. *By Evidence contained in the Pleadings.*CHAP. XIV.

By 1 Will. IV. c. 36, s. 14, as soon as an order shall have been pronounced by a court of equity for taking a bill *pro confesso*, such bill, or an examined copy thereof, shall be taken and read in any court of law or equity as evidence of the facts and matters and things therein contained, as though they had been admitted to be true by the answer of the defendant put in to such bill; and such bill so taken *pro confesso* shall be received and taken in evidence of such and the same facts, and on behalf of such and so many persons, as the answer of the defendant to the said bill could and might have been read and received in evidence of, in case such answer had been put in by the defendant thereto, and had admitted the same facts, matters, and circumstances as in such bill stated and set forth. And in like manner every other bill of discovery taken *pro confesso* under any of the provisions of the Act, shall or may be taken or read as evidence of the facts and matters and things therein contained to the extent aforesaid.

A plaintiff may read the defendant's answer in support of his case; and although the plaintiff may have filed his replication, he is still at liberty to make use of any admission contained in the defendant's answer.^b The defendant is also at liberty to read his answer in favour of his own case, which, as we have before seen, is taken to be true unless the plaintiff replies, in which case the defendant must support the statements in his answer by the evidence of witnesses. The plaintiff may read any passage in the answer he chooses, but in such an event he must read the whole of the passage; but he is not thereby precluded from adducing any evidence to disprove an

^b *Vancouver v. Bliss*, 11 Ves. 464; *Dawson v. Ellis*, 1 J. and W. 524.

CHAP. XIV. allegation contained in such passage.^c If the passage is qualified by, although it does not refer to, a subsequent passage, the defendant is at liberty to read this latter passage.^d

We have already seen that the answer of one defendant cannot be read against a co-defendant except in an interpleader suit, and that no admissions in an infant's answer will be binding on him. Nor is the joint answer of husband and wife to be taken as evidence against the wife,^e although their joint and several answer may be read as evidence against the wife in respect of her separate estate.^f

2. *By Evidence produced from Oral Examination.*

The method of obtaining evidence by written interrogatories which were prepared by counsel, had long been objected to by reason of the uncertainty and privacy with which the examination was conducted, for it was neither certain what witnesses would be forthcoming, nor what answer he might give to any particular question. It was necessary therefore to frame the interrogatories in a manner best calculated to meet the necessity of the case and the contingencies which were thought most likely to arise. Whether the examination took place in London before the examiner, or in the country before a commissioner specially appointed for that purpose, each of them took down the answers in writing, and was bound by an oath not to disclose the evidence taken.* Neither the

^c Price v. Lytton, 3 Russ. 206.

^d Rude v. Whitchurch, 3 Sim. 562.

^e Elston v. Wood, 2 M. and K. 678.

^f Callow v. Howle, 1 De Gex and Sm. 531 ; Clive v. Carew, 1 J. and H. 207 ; Stephens v. Heathcott, 8 W. R. 336 ; 6 Jur. N. S. 312 ; 29 L. J. Ch. 529 ; 36 Law Times, 112.

* A commission to examine witnesses was granted when they hap-

parties to the suit nor their agents were allowed to be present, and lest one particular witness (who if examined orally and publicly would have been found sufficient) should have omitted to give full evidence of the material facts arising from the uncertainty of the method, several other witnesses were often produced to supply the deficiency by proving the same facts. It is true the witnesses might be subjected to a cross-examination; but if the examination in chief was so uncertain, who would risk drawing the bow at such a venture when it was uncertain what even the examination in chief might be? except indeed where the witness was known to be friendly to the cross-examining party, and had previously communicated facts to be the subject of such cross-examination. The Chancery Commissioners, therefore, after a careful consideration of the subject, recommended, among other improvements, that the then existing system of examining witnesses upon written interrogatories should be abolished, and an entire change in the mode of taking evidence in chancery adopted (Ch. Com. Rep. pp. 7-40). Accordingly, the 28th sec. of 15 & 16 Vict. c. 86, abolishes the then existing practice, although witnesses to be examined *de bene esse* must still be examined *viva voce*, unless under particular circumstances.^g And sec. 29 provides that when any suit commenced by bill shall be at issue, the plaintiff shall within such time thereafter as shall be prescribed by the lord chancellor after issue joined therein, give notice to the defendant that he desires that the evidence to be adduced in the cause shall be taken orally or upon affidavit, as the case may be.

The 31st Order, 7th August, 1852, made in pursuance
pened to reside in the country, *i.e.* beyond twenty miles from London. If the witnesses lived within that distance, their examination took place before one of the examiners in London, which was technically called "An Examination in Court."

^g Cook v. Hall, 20 Law Times, 152.

CHAP. XIV. of the above section, prescribes the number of days' notice to be given.

This Order however was but of short duration, for by the 2nd Order, 13th January, 1855, the 31st, 32nd, and 33rd General Orders of 7th August, 1852, were abrogated and discharged. The 4th of those Orders (13th January, 1855) renders such notice unnecessary. This became embodied in the 19th Cons. Ord. r. 3, which last-mentioned Order became abrogated in its turn by the more recent Order, 5th February, 1861.

All witnesses to be examined orally under the provisions of the Act shall be examined by or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court (sec. 31).

Depositions to be taken down in writing and read over to witness, who shall sign the same in presence of the parties; but if he refuse to sign, examiner may, and state any special matter he may think fit.

The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: Provided always that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit: Provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just (sec. 32).

If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: Provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court (sec. 33).

CHAP. XIV.

If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted.

Proviso as to witness demurring to questions.

When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the record office of the said court, to be there filed, and any party to the suit may have a copy thereof, or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any general order of the lord chancellor in that behalf (sec. 34).

Original depositions to be transmitted to the Record Office, and filed.

It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said court; and any examiner appointed by any order of the court shall have the like power of administering oaths as commissioners now have under commissions issued by the court for the examination of witnesses (sec. 35).^h

Commission for examination of witnesses dispensed with, and examiner empowered to administer oaths.

Notwithstanding that the plaintiff or the defendant Affidavits as

^h See *Hextall v. Cheatle*, 20 Law Times, 129.

CHAP. XIV. in any suit in the said court may have elected that the evidence in the cause should be taken orally, affidavits by particular witnesses, or affidavits as to particulars facts or circumstances, may, by consent, or by leave of the court obtained upon notice, be used on the hearing of any cause, and such consent, with the approbation of the court, may be given by or on the part of married women or infants or other persons under disability (sec. 36).

Affidavits to be divided into paragraphs, numbered.

Every affidavit to be used in the said court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject (sec. 37).

Evidence, oral or by affidavit, on both sides, to be closed within time prescribed by general order.

The evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any general order of the lord chancellor, but with power to the court to enlarge the same as it may see fit; and after the time fixed for closing the evidence, no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the court previously obtained for that purpose:

Witnesses by affidavit to be subject to oral cross-examination, and afterwards to re-examination.

Provided always, that any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the lord chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served

Witnesses bound to attend.

with a writ of *subpœna ad testificandum* before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court shall think fit otherwise to direct (sec. 38).

CHAP. XIV.

As to expenses attending cross-examinations, etc.

This section is equivalent to the recent practice of passing publication.

Upon the hearing of any cause depending in the said court, whether commenced by bill or by claim, the court, if it shall see fit to do so, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit or in such manner as it may think fit (sec. 39).¹

Court may require the production and oral examination before itself of any witness, etc., and determine payment of the costs.

Any party in any cause or matter depending in the said court, may, by a writ of *subpœna ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used or which shall be used on any claim, motion, petition, or other proceeding before the court shall be bound on being served with such writ, to attend before an examiner, for the purpose of being cross-examined. Provided always that the court shall always have a dis-

Any party in a cause may by subpœna require attendance of any witness before an examiner.

¹ Smith v. Edwards, 20 Law Times, 60; Cable v. Cooper, *ibid.*; Wilkinson v. Stringer, *ibid.* p. 76.

CHAP. XIV. cretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case (sec. 40).

This is intended to be an improvement upon the old practice, as formerly there were no means of producing before the court the testimony of an unwilling witness; and lest it should be used for purposes of delay, the court may exercise its discretion as to whether it will make use of such evidence: *vide* Kennedy's Code, 157 *n.* And according to Orders 36 and 37, 7th August, 1852, notice of the intention to cross-examine must be given forty-eight hours previously to the opposite party. These orders however becoming merged in 19 Cons. Ord. r. 9, were abrogated by the more recent Orders 5th February, 1861.

Evidence subsequent to hearing to be taken the same as prior to hearing.

In cases where it shall be necessary for any party to any cause depending in the said court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing (sec. 41).

Cause at issue by replication.

When the cause is at issue, by filing the replication each defendant may, without any rule or order, proceed to examine his witnesses; and the plaintiff may do the same, so soon as notice of the replication being filed had been duly served on all the defendants who have answered or pleaded, or against whom a traversing note has been filed.

The traversing note became first known in practice by virtue of the 21st Order, 26th August, 1841; which directs that, where the defendant makes default in pleading, answering, or demurring, the plaintiff shall be at liberty to file a note at the six clerks' office (now the clerk of the records and writs, 3rd Order, 26th October, 1842),

to the following effect:—"The plaintiff intends to proceed with his cause, as if the defendant had filed an answer traversing the case made by the bill, and the plaintiff had replied to such answer, and served a subpoena to rejoin." The last words, relating to the *subpœna to rejoin*, are now of course to be omitted (*vide* 13 Cons. Ord. rr. 1 to 7 inclusive).

The lord chancellor (Cottenham), alluding to the 61st of the Orders, 8th May, 1845, conceived that there was an omitted case in the Orders which authorize service abroad of the subpoena only. Thus, where a defendant was living in America, out of the jurisdiction, and had been served with an order to appear and answer,—and, on his failure to do so, an appearance was entered for him by the plaintiff, the court refused to direct a copy of a traversing note filed by the plaintiff to be served out of the jurisdiction under Order 61, as that Order applies to cases only where the defendant has appeared by solicitor, or in person, and there was no other general order authorizing the court to do so.^j

If the defendant make default in appearing at the hearing, the plaintiff is not entitled as of course to take such a decree as he can abide by; but he must go through his case and take such a decree as to the court may appear just.^k

Generally, a party interested in the suit was incompetent to be examined as a witness: thus a defendant could not have examined the plaintiff, unless by consent on an order made upon motion, saving just exceptions; neither could one plaintiff examine another co-plaintiff as a witness. But where there was a suggestion that the party had no interest, one defendant might have been examined on behalf of a co-defendant, or by the plaintiff, as a wit-

As to a party
to the suit
being a
witness.

^j 8 Law Times, 269.

^k Evans v. Williams, 6 Beav. 118.

CHAP. XIV. ness. An interested witness might have been examined, provided he first exhibited a release.

It sometimes occurs that a party against whom a witness is about to be examined is not satisfied as touching the testimony of such witness: this objection may arise either in respect of his credibility or competency.

Competency
and credi-
bility of
witnesses.

The difference between the *competency* and the *credibility* of a witness appears to be this—that a man of the most infamous and depraved character, although not credible, may, nevertheless, be a competent witness. For it was the *infamia facti* which alone disqualified a witness in regard to his credibility, and prevented his evidence being admitted upon oath; on the other hand, it was only the *infamia juris* which was deemed capable of destroying the competency of a witness.¹

The grounds of objection to the competency of a witness were formerly :—

1. For want of reason or understanding, as in the case of lunatics, idiots, and children of so tender an age as not to understand the nature of an oath.

2. For defect of religious principles, as where persons do not profess any such religion as will be binding upon their conscience to speak the truth.^m

3. That disqualification which, until lately, arose from the conviction of certain crimes, such as forgery, perjury, subornation of perjury, etc.;ⁿ but, by the 6 & 7 Vict. c. 85, no witness is to be excluded from giving evidence by incapacity, notwithstanding such person offered as a witness may have been previously convicted of any crime or offence, or has any interest in the subject-matter in question.

4. A fourth objection might have arisen from interest, as in the case of a co-plaintiff, who could not be examined

¹ Phil. Ev. 28.

^m Ibid. 22.

ⁿ Ibid. 29.

on behalf of another plaintiff, or on behalf of a defendant.^o CHAP. XIV.

Although by an order for that purpose obtained upon the suggestion that the party to be examined was not interested, a plaintiff might examine a defendant, and a defendant a co-defendant: it is however provided by the last-mentioned Act, section 1:—"That in courts of equity any defendant to any cause pending in any such court may be examined as a witness on behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

By the 14 & 15 Vict. c. 99, ss. 2 & 3, it is provided that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding, in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as thereafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any parties to the said suit, action, or other proceeding. But (sec. 3) nothing therein contained shall render any person compellable to answer any question tending to criminate himself or herself.

The plaintiff who examines a defendant as a witness, is not, as formerly he was, prejudiced in his right to take a decree against him.^p

^o Farreday v. Wrightwick, 4 Russ. 114.

^p Harford v. Rees, 9 Hare, Append. 70; Week. Rep. 144.

CHAP. XIV. But notwithstanding these enactments, it has been held that the Act merely removes the objection arising from the fact of the witness being a party to the cause, and did not affect the case of a married woman, who might happen to be a party to the suit, and who therefore could not give evidence for or against her husband.^a

By the 16 & 17 Vict. c. 83, s. 1, it is enacted that on the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence; the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

It is also enacted that nothing therein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding or in any proceeding instituted in consequence of adultery (sec. 2). No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (sec. 3).

By an ancient order, before a party is allowed to examine a witness to invalidate the credit of any other witness, he must obtain a special order of the court, upon exceptions first put in writing and filed with the examiner,^r

^a *Alcock v. Alcock*, 5 De G. and Sm. 671; 21 Law Jour. 856; 16 Jur. 653; *M'Neille v. Acton*, 17 Jur. 661.

^r Beav. Ord. 187.

which order may be obtained before the time for closing CHAP. XIV.
evidence has expired;^s the court attending with great
caution to an application for permitting any witness to
be examined after the time for closing evidence had ex-
pired.^{t*}

Formerly when publication had passed, the court would, After time
for closing
evidence,
and before
hearing,
articles may
be exhibited
as to credit.
at any time before the hearing, give a party leave to ex-
hibit articles to *discredit* a witness who had been cross-
examined, by general interrogatories as to credit, and
when the interrogatories went to such particular facts
only as were not material to what is in issue in the cause;^u
otherwise the depositions might have been suppressed:
they therefore could not be too general, in reference to
any matter at issue in the cause. And it is presumed
that notwithstanding the practice of passing publication
has given place to another technical form of practice
under the 38th section, 15 & 16 Vict. c. 86, now known
as "closing evidence;" no alteration has been made with
regard to exhibit articles for the purpose of discrediting a
witness. The principal question resolved itself into this
—namely, whether the witness is to be believed upon his
oath, since a contrary practice would let in all sorts of
slander.^v And although Lord Hardwicke, in *Gill v. Wat-*
son,^w whilst he admitted the rule to exist in law, yet
stated that the practice might be different in equity; for

^s *White v. Fussell*, 19 Ves. 127.

^t *Purcell v. M'Namara*, 8 Ves. 324.

* Sir Samuel Romilly, in the case of *Purcell v. M'Namara*, last cited, refers to a somewhat different course, namely, to exhibit interrogatories, and not to file exceptions; which he said was adopted in the case of *Paris v. Paris*, about two years previously, before Lord Alvanley at the Rolls and that Lord Hardwicke, in *Callaghan v. Rochfort*, 3 Atk. 643, seems to have understood the rule in the same way.

^u *Purcell v. M'Namara*, 8 Ves. 324.

^v *Anon.* 3 Ves. and B. 93.

^w 3 Atk. 522.

CHAP. XIV. at law a witness cannot be prepared to defend every particular action of his life, but upon an examination in this court, he has time enough to recollect, and therefore be able to answer any particular charge.

In fact, that great judge seemed to doubt whether the difference really did exist.

Paris v.
Paris.

In *Paris v. Paris*, heard at the Rolls Court in 1801, and referred to in *Purcell v. M'Namara*, it was determined that if the inquiries go to particular facts, either in the articles themselves or in the affidavits in support of them, or embodied in the subsequent interrogatories, they may be suppressed as scandalous.^{x*}

Lord
Clarendon's
Orders, 22nd
May, 1661.

In one of Lord Clarendon's Orders, 22nd May, 1661, "The examiner shall not examine any witness to invalidate the credit of any other witnesses but by special order of the court; which is sparingly to be granted, and upon exceptions first put into writing and filed with the examiner, without fee, and notice thereof given to the adverse party, or his clerk (attorney), together with a true copy of the said exceptions, at the charge of the party so examining."^y

Exception
the credit of
a witness by
order, upon
special
application.

And whether it be before or after the expiration of the time for closing evidence, an exception to the credit of witnesses can only be by order, upon special application with notice. And, therefore, under the above Order of Lord Clarendon, evidence taken to the credit of a witness upon the examination in chief, will be sup-

^x *Carlos v. Brooke*, 10 Ves. 49.

^{*} Lord Chief Justice Pratt, in *Layer's case*, says, "The reason why particular facts are not to be given in evidence to impeach the character of the witness is, that, if it were permitted, it would be impossible for that witness, having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the character of witnesses may be vilified, without having any opportunity of being vindicated."—6 State Tr. 198-316; S. C., Howell's State Tr. 246-286.

^y Beav. Ord. 188; Sand. Ord. 302. *Vide* also Ord. 228.

pressed as impertinent.^z But after a party has exhibited articles to discredit a witness, it will be too late for him to move that a deposition may be suppressed for irregularity.^a CHAP. XIV.

The usual method of impeaching the credit of a witness at law was by producing other persons who are called upon to impeach it, to swear whether they have the means of knowing his general character, and whether, with such knowledge, they would believe him upon his oath. But by the 17 & 18 Vict. c. 125, called the Common Law Procedure Act, it is enacted that a party producing a witness, shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement (sec. 22). This section has been held to apply also to proceedings in chancery and to examinations taken before an examiner^b (*vide* also the three following sections). The other mode of testing the credit of a witness is, by putting questions to him, and, after he has been cross-examined, to get other witnesses to swear that such facts as he has alleged are not true.^c Method of impeaching credit of witness.

Where an examination is allowed, to impeach the credit of a witness, he has a right to rebut the testimony, and to support his own credit by counter-evidence; thus, in Counter-evidence of witness.

^z *Mill v. Mill*, 12 Ves. 406.

^a *Malone v. Morris*, 2 Moll. 324.

^b *Buckley v. Cooke*, 3 Week. Rep. 33.

^c 2 Phil. on Evid. 432. Per Sir S. Romilly, in 8 Ves. 324.

CHAP. XIV. *Ambrosio v. Francia*, referred to in 8 Ves. 364, witnesses appear to have been examined by both parties,—the court directing that the plaintiff should be at liberty to examine as to the fact upon which witness had deposed, and also to the competency and credit of the witness.^d And, in a case^e at the Rolls, Lord Langdale stated that the practice in proceeding to discredit a witness was to exhibit articles first, and afterwards apply for a commission; although a motion to grant a commission, and for liberty to exhibit articles at the same time, may be granted.*

Articles as to competency not allowed after expiration of time for closing evidence.

But a party is not at liberty to exhibit articles against the *competency* of a witness after the time for closing evidence expires; for this might have been objected to and inquired into pending the examination, unless the fact of such incompetency did not come to his knowledge until after the expiration of that time, and then he may apply, not by exhibiting articles but by motion for leave to examine to that matter upon a foundation of ignorance at the time of the examination.^f

Articles impeaching the credibility of a witness, if in a town cause, are filed with the examiner, and if in a country cause, with one of the clerks of the records and writs;^g and they are annexed to the depositions in the office.^h

It is a rule in practice that, when a witness has been examined in chief as to a particular fact, the opposite

^d Phil. on Evid., citing *Luttrell v. Reynell*, 1 Mod. 282.

^e *Harvey v. Mount*, 3 Law Times, 218.

* It will be borne in mind that the commission to examine witnesses within the jurisdiction is abolished. *Vide* 15 & 16 Vict. c. 86, ss. 21 and 35.

^f *Callaghan v. Rochfort*, 3 Atk. 643.

^g *White v. Fussell*, *supra*. *Vide* 3rd Ord., 26th October, 1842, 1 Cons. Ord. r. 35.

^h *Hinde's Ch. Prac.* 274.

party can only cross-examine him upon that very fact, and not extend his examination to any other subject. CHAP. XIV.

The rules of evidence in a court of equity, as to witnesses, are exactly the same as at law.ⁱ*

When the witnesses are unwilling or refuse to attend at the examination, they must be served with a *subpœna ad testificandum*; and in case any of the witnesses has a deed, bond, paper, or any writing or instrument which the party considers material to the question, and the production of which is necessary, such witness ought to be served with a *subpœna duces tecum*: and if the witness, on being served with a *subpœna*, do not attend at the time and place appointed for his examination, the party requiring his attendance, upon affidavit of such service and notice, and non-attendance of the witness in pursuance thereof, may move the court that he attend at his own expense in four days, or be committed. A warrant then issues from the lord chancellor, on which the witness is taken and committed to the Queen's prison. A witness will be liable also to stand committed, if he attend, but refuse to be sworn or examined, provided the interrogatories are not such as tend to draw from him evidence that would render him liable to a criminal prosecution; in which case, or in any other, where he objects to answer an interrogatory, he must do so in the form of a demurrer, which is set down for hearing among the general demurrers,^j and is taken down by the examiner, or, if out of the jurisdiction, by commissioners, from the mouth of the witness: and here it may be noticed that,

When witnesses are unwilling to attend, *subpœna ad testificandum* necessary.

ⁱ *Henley v. Phillips*, 2 Atk. 48.

* "Although in general the rules of evidence in equity differ not from those used at law, yet in particular cases, such as those of fraud or trust, the courts of equity use large discretion."—Gresley's *Evid. in Eq.* 328 *n.* (a). *Man v. Ward*, 2 Atk. 223; *Lupton v. White*, 15 Ves. 443.

^j *Parkhurst v. Sowton*, 2 Swans. 194.

CHAP. XIV. in the case referred to, Lord Eldon remarked, that it is by an abuse of this term the witness's objection to answer is called a *demurrer* in the popular sense.*

When a party demurs to answer a criminal charge, his refusal to answer it is not to be taken as an inference of the truth of the charge contained in the bill, or that the defendant thereby admits the fact to be true.^k

When interrogatories are leading.

When the interrogatories are leading, or are irregular, they will be ordered to be suppressed; and where the examiner has fallen into an error in taking evidence, the court will order it to be amended, and will also order the witness to be re-sworn after the time for closing evidence has passed.^l

Where facts are doubtful.

In most cases, where the facts upon the depositions in equity are doubtful, the court will allow the bill to be retained upon the file for a year; this is done to allow parties to try the truth of such facts by an action at law.^m All affidavits of witnesses are now to be taken and expressed in the first person of the deponent (Order 128, 8th of May, 1845; 18 Cons. Ord. r. 1).

3. *By Documentary Evidence.*

Documents and writings to be proved in a suit are technically called *exhibits*; the mode of proof in reference to them is either by *admission* or by *witnesses*.

Exhibit; to

The term *exhibit* is more usually confined to that ex-

* Hence, among the illiterate, who are at all times captivated by fine expressions, we frequently hear a person tendering his refusal or objection to any proposal in some such manner as the following: "Oh, I demur to this;" "I do assuredly put in my demurrer to that;" or, "I shall certainly demur to such a measure," etc.

^k Lloyd v. Passingham, 16 Ves. 69.

^l 2 Eq. Ca. Ab. 60; Lloyd v. Waite, V. C. of England's C., August 3, 1840.

^m Smith v. Earl of Effingham, 10 Law Times, 1.

amination, wherein certain documents are, for the sake of saving expense and trouble, allowed to be proved *vivâ voce* at the hearing. This is the usual course when there exists no necessity for a cross-examination by the other party, or in cases where the cause is set down upon bill and answer only, or where either party has omitted to prove some material document until the time for closing evidence has expired. This convenient manner of admitting documents to proof is only obtained by order fully describing those which are thus intended to be used, and a copy of the order must be left with the solicitor of the adverse party two days before the hearing of the cause. As a matter of course, this kind of examination is limited to a few simple questions, such as the custody and identity of an ancient document produced by a librarian or registrar, the accuracy of an office copy produced by the proper officer, the execution of a deed, where the party examined was the witness who attested the deed, which mode of proof, however, is not allowed where the attesting witness is alleged to be dead. The handwriting of a letter, or receipt, or promissory note, may be thus proved;ⁿ but the same summary mode of proof will not, for the reasons hereafter mentioned, be allowed to prove the validity of a will, because a searching examination might arise as to the sanity of the testator.

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what species
of examina-
tion applic-
able.

The foregoing *vivâ voce* examinations are called proving by *admission*.

The regular and usual method, however, of proving exhibits not admitted, is before the examiner, to enable the party to avail himself of a cross-examination.

In general, maps, plans, drawings, models, and other things of a like nature, exhibited to the court by way of evidence, and not admitted by the other side, are iden-

ⁿ Gresley's Evid. 188.

CHAP. XIV. tified and proved as exhibits by the evidence or by affidavits of parties.^o

After thirty years a deed or will proves itself.

It was formerly the rule, that a deed forty years old might be produced in evidence, without any proof of its due execution; and the reason assigned was, that the witness could not be supposed to live above forty years, —forty years being a sufficient proof of a prescription: besides, the age of man is no more than sixty years, and he being supposed to be twenty years before he is of age sufficient to understand the general forms of contracting, it follows that, after forty years, the witness must be regarded as dead, and therefore, since no person living could be presumed to be coeval with such deeds, they might be offered in evidence without proof. Thus reasoned our legal progenitors. This period, however, is now reduced to *thirty* years; at the expiration of which a deed or any other document is said to prove itself.^p Thus, a will thirty years old, produced from the proper custody, will prove itself. Which period of limitation is to be computed from the date of the will, and not from the testator's death, and is calculated at the time of its production.^q

To prove a will, sanity of testator to be proved.

When a suit is instituted for the purpose of proving a *will* of realty, the sanity of the testator must be proved, because the will is supposed to be made when the testator is *in extremis*, although not requisite when to establish a *deed of trust* for payment of debts, for then the sanity is presumed.^r

Hindson v. Kersey.

In the case of *Hindson v. Kersey*,^s Pratt, Lord Chief Justice of the Common Pleas (afterwards Lord Camden),

^o Gresley's Evid. 172 n. (f).

^p Gilb. Evid. 103.

^q *Man v. Ricketts*, 7 Beav. 93.

^r *Harris v. Ingleden*, 3 P. Wms. 93.

^s *Vide* 4 Burns's Eccles. Law, 89.

referring to the Statute of Frauds, and the distinction between the attestation of a will and of any other instrument, makes the following observations:—"And that the statute had a main view to the quality of the witnesses will appear from this consideration, namely, that a will* is the only instrument in it required to be attested by subscribing witnesses at the time of execution. It was enough for leases and all other conveyances, marriage agreements, declarations, and assignments of trust, to be in writing. These were all transactions of health, and protected by valuable considerations and antecedent treaties. The power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the contract was reduced into writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death. And the only question that can be asked in this case is, Was the testator in his senses when he made it? and, consequently, the time of execution is the critical minute that requires guard and protection. Here you see why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men, whose hands have survived their heads; who have still strength enough to write a name or make a mark, though the capacity of disposing is dead. What is the condition of such an object in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease, put to the laborious task of recollecting the full estate of all his affairs, and to weigh the just merits and demerits of those who belong to him, by remembering all and forgetting none? . . . What shall then secure the testator, at this

* It will be remembered that his lordship here speaks of a devise of real estates only, and, under the former requirements, of a devise of realty in regard to attestation.

CHAP. XIV. important moment, from imposition? What shall protect the heir-at-law, and give the world a satisfactory evidence that he was sane? The statute speaks of credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive, here they are active,—and, in truth, the principal parties to the transaction: the testator is entrusted to their care. Sanity is the great fact the witness is to speak of when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that court never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor.”

Witnesses to a will, the witnesses of the court.

These witnesses must, upon an issue at law, be examined, for they are not the witnesses of the one party or the other, but of the court; unless in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right.^t

Issue *devisavit vel non*.

Notwithstanding the will may have been clearly proved upon interrogatories, the heir-at-law is still entitled to an issue *devisavit vel non*,^u unless by acquiescence or misconduct he has precluded himself.^v

But where the will requires to be proved for certain

^t *Bootle v. Blundell*, 19 Ves. 494–500; S. C., Coop. 136; 1 Meriv. 193.

^u *Pemberton v. Pemberton*, 11 Ves. 53; 1 Wilson, 216.

^v *Bootle v. Blundell*, *ante*; *Man v. Ricketts*, 7 Beav. 93.

purposes, only such proof as will satisfy the court will be sufficient.^w CHAP. XIV.

Probate of a will in her Majesty's Court of Probate is sufficient as far as it goes: further proof, if necessary, may be proceeded on in a court of equity.^x This court requires the judgment of the Court of Probate that an instrument is testamentary, but is not always satisfied with the proof in that court, but requires the witnesses to be examined again.^y A will was never allowed to be proved before the master for the purpose of establishing it.^z Probate generally sufficient.

The witness must sign his examination, otherwise it is not complete; and if he die between his examination and signing the same, his evidence cannot be made use of.^a Signature of witness under examination necessary.

Although a peer is allowed, by virtue of his rank, to answer upon his attestation of honour, yet, in giving his evidence as a witness, he must do so upon oath. This rule is applicable, as well to affidavits and examinations before the chief clerk, as to those before the examiner.^b A peer answers upon his honour, but testifies upon oath.

Generally speaking, a sovereign prince, whilst resident in the dominions of another, is exempt from the jurisdiction of the court there; nevertheless, if he sue another person in our courts of equity, he thereby submits to the jurisdiction, and a cross bill may be filed against him, which he must answer upon oath. But the circumstance of his filing a bill in chancery against one person does not render him liable to be sued by another person for a distinct and independent matter.^c Foreign reigning prince, suing in Chancery, submits thereby to its jurisdiction.

^w Wood *v.* Stane, 8 Price, 613.

^x Colman *v.* Sarrell, 1 Ves. jun. 54.

^y Rich *v.* Cockell, 9 Ves. 376.

^z Lichmere *v.* Brazier, 2 J. and W. 289.

^a Copeland *v.* Stanton, 1 P. Wms. 413.

^b Dan. Ch. Prac. by Headlam, 865.

^c Duke of Brunswick *v.* King of Hanover, 6 Beav. 1.

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 Mode of
 proof where
 deed im-
 peached on
 ground of
 fraud.

Although, according to the ordinary rules of the court, the execution of deeds, or the hand-writing of letters and other documents, are allowed to be proved *vivâ voce*, yet where, by the defendant's answer, the validity of a deed is impeached upon an alleged fraud, in this case the plaintiff must prove his deed before the examiner, in order that the defendant may have an opportunity of cross-examining the witnesses touching the fraud in question.^d And if the *validity* only, and not the execution of a deed, is questioned in a suit, it may be proved *vivâ voce* at the hearing; but not if it relate to the execution of the deed.^e

4. *By Evidence from Affidavits.*

We have seen that where there was a mere exhibit, or nothing but the handwriting of a party, or the formal execution of a deed was required to be proved, it might have been adduced *vivâ voce* at the hearing, and only at the hearing of the cause; for whenever the matter was brought before the court upon an interlocutory application, such as a motion for an injunction or a receiver, which, perhaps, might involve matters of the utmost importance to the parties concerned, the court not only proceeded upon affidavit evidence, but it possessed no other, and no means of enforcing the production of any other evidence. The Chancery Commissioners, therefore, could not see upon what principle any other evidence, required by the court, should necessarily differ, according as the occasion is or is not the formal hearing of a cause; and having observed upon the different kinds of evidence then in use, and that their objections to an affidavit was, that the language was not that of the witness, but merely

^d Maber v. Hobbs, 1 You. 583.

^e Attorney-General v. Pearson, 7 Sim. 309; Attorney-General v. Shaw, *ibid.*

the language of the solicitor, or rather his assent on oath CHAP. XIV.
to the statement prepared by the solicitor, and that he is
not seen nor liable to cross-examination, they proposed
that the parties should be entitled to have the evidence
taken in the most satisfactory way, and among other im-
provements, that affidavit evidence should in general be
admissible.^f That affidavits may, upon all interlocutory
applications, be read against the answer, which should be
regarded in such cases as an affidavit only.

Any witness having made an affidavit filed by any
party to a cause, shall be subject to oral cross-examina-
tion within such time after the time fixed for closing the
evidence, as shall be prescribed by the lord chancellor, by
or before an examiner, in the same manner as if the evi-
dence given by him in his affidavit had been given by
him orally before the examiner, and after such cross-
examination may be re-examined orally by or on the part
of the party by whom such affidavit was filed (15 & 16
Vict. c. 86 s. 38, *supra*).

And the witness is bound to attend before such ex-
aminer, to be so cross-examined and re-examined, upon
receiving proper notice and payment of his reasonable
expenses, as though he had been served with a *subpœna*
ad test. (*ante*, 15 & 16 Vict. c. 86, s. 38).

The re-examination of any such witness is immediately
to follow his cross-examination, and is not to be delayed
to a future period (35 Ord., August 7, 1852; 19 Cons.
Ord. r. 9).

No affidavit or deposition filed or made before issue
joined in any cause, shall, without special leave of the
court, be received at the hearing thereof unless within
one month after issue joined, or within such longer time
as may be allowed by special leave of the court, notice in
writing shall have been given by the party intending to

^f Chan. Com. Rep. 40.

CHAP. XIV. use the same to the opposite party of his intention in that behalf (6 Ord., January 13, 1855; 19 Cons. Ord. r. 12).

But there can be no examination of witnesses after the time for closing the evidence has expired, except by consent of the parties or special order of the court.^g

Protection
of witness
from arrest.

The court will sometimes protect a witness against a detainer lodged against him, when returning from his examination before the examiner or judge at chambers, when the deviations out of the direct route are necessary, and are *bonâ fide*, such as stopping to take refreshment, or examine account-books, etc.^h So a creditor, attending to prove his debt before the commissioners of bankruptcy, has been held to be privileged from arrest.ⁱ Also, a defendant was ordered to be discharged, who had been attending a warrant in the master's office to produce papers, and was arrested upon leaving the office.^j

Besides the ordinary means of examining witnesses after issue is joined in a suit, there is another method of taking their evidence, arising out of the peculiar circumstances of the case, or the state and condition of the witnesses themselves. This method is called an examination *de bene esse*.

Examination
de bene esse.

The practice of examining witnesses *de bene esse* is said to have arisen from the desire of those judges who sat in the Court of Chancery in its earlier times to assimilate the proceedings in that court, as much as possible, to the course adopted by the Roman Civilians, whose manner of examining witnesses *in perpetuam memoriam rei* was two-fold—namely, the *common examination*, or in *meliori*

^g Sand. Ord. 119; 15 & 16 Vict. c. 86, s. 38.

^h *Sidgier v. Birch*, 9 Ves. 69.

ⁱ *List's Cases*, 2 V. and B. 374.

^j *Franklin v. Colquhoun*, 1 Madd. 580. *Vide Gibbs v. Phillipson*, 1 R. and M. 19.

formâ. The common examination was resorted to in those cases where the witnesses were very old and infirm, or in danger of death, or were about to journey to foreign parts: it was then usual to file a libel, without waiting till the actual commencement of the action, the *litis contestatio*. The plaintiff examined his witnesses, giving notice thereof immediately to the other side of the time and place of the examination, in order that the defendant might, if he thought fit, come in and cross-examine them; but, in this case, the plaintiff was obliged to commence his action within a year, otherwise the depositions went for nothing: the witnesses also, if they recovered, or did not go abroad, must have been examined *post litem contestatam*. CHAP. XIV

The examination in *perpetuam rei memoriam in meliori formâ* was *ad transumenda instrumenta*: in this case, an action must have been already commenced; but, as in the proof of instruments there would not exist that emergency, as in those cases where the witnesses were in danger of dying, or going into remote countries, the actor or plaintiff was under no necessity to proceed in his action upon those instruments within the year.

This latter method of examining witnesses, *i. e. in meliori formâ*, has been adopted by the Court of Chancery to perpetuate testimony to a disputable fact, when the witnesses are old and infirm and in danger of dying, or about to depart the kingdom, or where the witness is the only witness who can give evidence to an important fact; in such cases it is usual for the court to allow an examination to take place *de bene esse*, although no suit is depending, for it may be that an interested party is only waiting for the death of that only witness to commence hostilities.^k *In meliori formâ.*

Also, where the thing examined into lay only in the

^k Hind, Ch. Pr. 365; Dan. Ch. Pr., by Headlam, 909.

CHAP. XIV. knowledge of the witness, and was a matter of great importance (the question being whether or no a settlement was a forgery), he was ordered to be examined *de bene esse*, though he was not proved to be old or infirm.¹

Difference
between
bills in *perp.*
mem. rei and
de bene esse.

It has also been said^m that the difference which exists between bills in *perpetuam rei memoriam*, and bills for the examination of witnesses *de bene esse*, is, that the former are filed by persons who are in the actual and undisturbed possession of property, to the title of which there can be no present chance of judicial investigation; consequently, to prevent a failure of justice, it is necessary that some means should be resorted to, for the sake of preserving the testimony of witnesses, although they may neither be aged nor infirm; nor witnesses going abroad, and although the material fact may be evidenced by more than one witness: where, however, a person is either out of possession, or, being in possession, is disturbed in it, or has an action brought against him, as having a tortuous title, he may assert his right either by an action to be commenced by him, or in the action brought against him. In such cases, there is no necessity for applying to a court of equity; for an action being brought, the party desirous of preserving the testimony of his witnesses will have ample opportunity of so doing, unless indeed there be sufficient proof of his being in danger of losing their evidence before the action is brought to a trial: and in case his testimony is required to be used in the action, a bill must be filed in chancery, for the examination *de bene esse*, with the proper affidavit. A motion is then made for the required order; but the action in which such testimony is required to be used

¹ Shirley v. Earl Ferrers, 3 P. Wms. 77; Pearson v. Ward, 1 Cox, 177.

^m Newl. Ch. Pr., 3rd edit., 450. See also Lord Dursley v. Fitzhardinge, 6 Ves. 254.

must have been actually commenced before the bill for the examination *de bene esse* is filed. There is no distinction between this examination and that which is adopted in the ordinary method of examining witnesses. CHAP. XIV.

Formerly the witnesses were examined upon interrogatories. But since the 15 & 16 Vict. c. 86, the examination *de bene esse* is to be taken orally in the method prescribed by the Act.ⁿ

The examination may, if the witness is in town, be taken by one of the examiners of the court. If the witness is or resides in the country, a special examiner may be appointed, and the opposite party is entitled to forty-eight hours' notice of the appointment, for the purpose of the cross-examination.^o

Where a cross bill has been filed by a defendant against the plaintiff to the original suit, who is in contempt for not putting in his answer to the cross suit, a motion to stay proceedings in the original cause is not the proper course; but the defendant to such original suit must apply to enlarge the time for closing the evidence therein, until a fortnight after the answer to the cross bill shall have been filed.^p This application must be made upon motion, which is not of course, but of which notice must be given;^q and it seems that, even after answer, the time for closing the evidence is not enlarged as of course, until the coming in of the answer to the cross bill.^r Practice in
reference to
cross bill.

ⁿ Cook *v.* Hall, 9 Hare, Append. 20; 16 Jur. 1008.

^o Reeves *v.* Hodson, 21 Law Times, 124; Pillan *v.* Thompson, 10 Hare, Append. 76; 17 Jur. 781.

^p Creswick *v.* Creswick, 1 Atk. 291.

^q Aylet *v.* Easy, 2 Ves. sen. 336.

^r Dalton *v.* Carr, 16 Ves. 93; Cook *v.* Bromhead, *ibid.* 133.

CHAPTER XV.

PUBLICATION OR CLOSING EVIDENCE.

WITHOUT adverting to the former practice respecting the rules to produce witnesses after their examination at the proper office in town, or by commissioners in the country, it will be sufficient in this place to state briefly the new practice introduced by the 15 & 16 Vict. c. 86, sec. 38, before stated, and now regulated by the 6th Gen. Ord. 13th Jan. 1855, and 19 Cons. Ord. r. 12, *ante*; and also the more recent Orders, 5th Feb. 1861.

If either party is unable to complete the examination before the time for closing evidence expires, he must make an application to enlarge the time, which is now made, to the judge while sitting at chambers.

Under an enlargement at the instance of one party, all the other parties are enabled to examine witnesses under it.

The court will, sometimes, under the discretionary power contained in the 15 & 16 Vict. c. 86, according to the special circumstances of the case, allow the plaintiff at the hearing to produce a further affidavit after the time for closing evidence has expired, and after the cause has been set down for hearing.^a

And now by the new Orders, 5th Feb. 1861, the method

^a Hope *v.* Threlfall, 2 Eq. Rep. 49; 17 Jur. 1021; 2 Week. Rep. 4.

of taking evidence under the last-mentioned Act is somewhat altered and brought nearer to the common-law practice of examination, and relates to evidence to be taken at the hearing only and after issue joined. The principal objects are, 1st. That an order may be obtained upon summons at chambers for the purpose of taking evidence *viva voce* at the hearing upon any specified facts, which facts are to be made out to the satisfaction of the judge. 2. That any examinations before the examiner are to be *ex parte*, and any cross-examination thereon is to be made at the hearing. 3. Where a witness has been so examined *ex parte* before an examiner, notice of cross-examination at the hearing must be given by the opposite party, otherwise his evidence cannot be used without leave.

This Order commences by abrogating the 3 & 4 rules of the 18th Cons. Gen. Ord., and rules 3, 7, 9, and 13 of the 19th Cons. Gen. Ord.

By the 3rd rule of the Order, in any cause the plaintiff or any defendant may within fourteen days after issue, joined apply to the judge in chambers by summons, to be served on the opposite party for an order, that the evidence in chief may be taken *viva voce* at the hearing, and the judge may order the evidence of such facts or issues distinctly and concisely specified in such order to be taken accordingly, or if satisfied that the application is unreasonable or vexatious, may refuse the order. When such order is made, the examination in chief, cross-examination, and re-examination, will be taken before the court at the hearing, and no affidavit or evidence taken before an examiner will be admissible at the hearing in respect of any such fact or issue included in such order.

Except as when provided, and where it is deemed expedient on account of the age, infirmity, or being out of the jurisdiction, no plaintiff or defendant can require

CHAP. XV. the evidence in chief at the hearing, to be taken orally, and, save as before mentioned, each party after issue joined may verify his case either wholly or partially, by affidavit or oral examination *ex parte*, before an examiner under the 6th rule of the order (r. 4). Such evidence in chief on both sides (including the cross-examination and re-examination of any person under the 10th and 11th of the rules) must be closed within eight weeks, unless enlarged by special order (r. 5). Except under 10, 11, 16, and 17, of these rules, every examination taken by the examiners of the court, or by any special examiner, for the purpose of being used at the hearing, is to be taken *ex parte*, and deemed an affidavit, and the examiner is to mark it as taken *ex parte* (r. 6). And, save such last excepted rules, no cross-examination of any party to be used at the hearing of a cause in which issue is joined, is to be taken otherwise than before the court at the hearing (r. 7). If, however, after issue joined, the parties by writing, signed by them or their respective solicitors, and filed at the office of the clerk of records and writs, agree that the oral examination in chief and cross-examination of any witness, or the cross-examination of any person who has made an affidavit, or who has been examined *ex parte* before an examiner, be taken before an examiner in manner provided by 15 & 16 Vict. c. 86, such examination may be taken accordingly. These examinations, cross-examinations, and re-examinations must immediately follow each other (r. 10). The court or judge may direct that the oral examination and cross-examination of any witness or party, or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, to be taken before an examiner of the court or a special examiner, under the 15 & 16 Vict. c. 86, if it appears that owing to the age, infirmity, or absence out of the jurisdiction, or for any other cause, it is expedient

that such direction be given which may be obtained on application to the court or judge in chambers on notice (r. 11). Where in any cause a party has filed an affidavit, or where in any cause in which issue has been joined, a witness has been examined *ex parte* under rule 6, any opposite party may serve upon him or his solicitor a notice in writing requiring the production of such deponent or witness for cross-examination before the examiner or before the court, such notice to be served, unless otherwise ordered. Where such cross-examination is to be taken before the court at the hearing of a cause in which issue is joined before the expiration of fourteen days from the closing of evidence; and where such cross-examination is to be taken before the examiner in a cause in which a notice of motion for a decree or decretal order has been served, and to be used at the hearing of such motion, then at any time before the expiration of the fourteen days next after the end of the time allowed for the plaintiff to file affidavits in reply; and in every other case within fourteen days next after the filing of the affidavit or examination upon which such defendant or witness is to be cross-examined; and unless such deponent or witness be produced accordingly, such affidavit or examination cannot be used as evidence unless by the special leave of the court (r. 19). The party by whom such notice is given may compel the attendance of such deponent or witness for cross-examination in the same way as he may compel the attendance of a witness to be examined where an order is made for taking evidence *viva voce* at the hearing under the 3rd rule (r. 20). Under the 19th rule, at the hearing of a cause in which issue is joined, either party may upon notice apply to the court or to the judge at chambers to fix a day for the hearing of the cases (r. 21). Notice of examination or cross-examination of any witness, whether before the court or one of the ex-

CHAP. XV. aminers, or a special examiner, must be given to the opposite party forty-eight hours before; and such notice must contain the name and description of the witness, and the time and place of such examination or cross-examination, unless the court think fit to dispense with such notice (r. 22). Where such an affidavit is to be used as evidence before the court or a judge at chambers, the deponent in each statement must show his means of knowledge (r. 23). The 24th rule relates to consents as to the mode of procedure on behalf of persons who are under disability.

CHAPTER XVI.

SETTING THE CAUSE DOWN FOR HEARING.—SUBPŒNA TO
HEAR JUDGMENT.—HEARING THE CAUSE.—DECREE
NISI AND FINAL.

WE are now arrived at that stage of the proceedings when, the cause being at issue, the examination of witnesses having taken place, and the time for closing the evidence having elapsed (unless where it has, by application, been enlarged), the plaintiff is at liberty to set down his cause to be heard. If the plaintiff neglects to do so, any defendant, after the expiration of four weeks, may set the same down at his own request, instead of proceeding to dismiss the bill for want of prosecution, and he may obtain a subpœna to hear judgment and serve it on the plaintiff (116th Ord., 8th May, 1845. See also 114th Ord., art. 4; 21 Cons. Ord. 21, r. 1).

These Orders relate only to those cases where the plaintiff requires an answer from the defendant; but where a defendant to a suit commenced by bill, who shall not have been required to answer the bill, and shall not have answered the same, shall be at liberty to apply for an order to dismiss the bill for want of prosecution at any time after three months from the time of his appearance, unless a motion for a decree or decretal order shall have been set down in the meantime or the cause shall have

CHAP. XVI. been set down to be heard (29th Ord. 7th Aug., 1852 ;
 — 33 Cons. Ord. r. 13).

When there is an abatement of the suit as to one of several defendants, and other parties are thereby brought before the court, they must each be served with a subpoena to hear judgment ; but the rest of the defendants need no such service.

Certificate
of record
and writs
clerk.

Previous to setting the cause down, the plaintiff must obtain the certificate of the clerk of the records and writs that the various pleadings in the cause have been duly filed, which certificate will not be granted unless all the defendants who are within the jurisdiction have answered the plaintiff's bill.

By an Order, 23rd Feb. 1850, all causes thenceforth to be heard before the lord chancellor or one of the vice-chancellors, shall be set down for hearing by the registrars upon production to them of the certificate of the proper officers that the same is in a fit state to be set down for hearing, without any fiat, order, or direction from the lord chancellor for that purpose (21 Cons. Ord. rr. 2 and 9).

By virtue of this order the solicitor who applies to have a cause set down for hearing is to indorse on the record and writ clerk's certificate his name or firm, and the party for whom he acts, and also the date (Reg. Reg. March, 1850 ; June, 1854).

A copy of the bill must be prepared for the use of the judge before whom the cause is set down for hearing.

Consent and
short causes.

Besides the causes in the general paper, there is a paper of *consent* causes and *short* causes : the former is where the decree is of course and consented to by the other party, and where the defendant submits to attend the hearing without being served with a subpoena for that purpose ; *short* causes are where the decree is either of course or involves but little difficulty. A short cause

being set down in its turn in the cause-book is, upon a certificate of plaintiff's counsel that it is a short cause, and with the consent of defendant's solicitor, advanced to be heard out of its turn:^a but a day in term is generally fixed for hearing these causes. CHAP. XVI.

In a recent case, however,^b the master of the rolls stated that it was his custom to dispense with the consent of the solicitor of the defendants on the counsel for the defendants declining to say that the causes are not proper to be heard as short causes. And, in the same case, it was also held that a special application on the part of the defendant to have a cause advanced and heard as a short cause will be granted, unless the counsel for the plaintiff will undertake to say that the cause *is not* a proper one to be so heard.

By a regulation of the registrar's, causes are marked to be heard as short upon the certificate of counsel only, no consent from any solicitor in the cause being requisite (Reg. Reg., June, 1854).

The cause being set down for hearing, and the plaintiff's solicitor having obtained from the registrar a note thereof in writing, which fixes the day of hearing, leaves it with a præcipe for a subpoena to hear judgment at the clerk of the records and writs.

The subpoenas may each contain the names of three defendants, and are served either on the defendants themselves or their solicitor.

The return of the subpoena *ad audiendum judicium* may now, under the provision of the 82nd Order, 23rd November, 1831, and 21 Cons. Ord. r. 4, be made as well in the vacation as in term. It is not to be returnable at any time less than one lunar month from the teste of the writ (16th Ord., May, 1845, art. 46; 21 Cons. Ord. r. 5). The Subpoena to hear judgment.

^a 1 Newl. Ch. Prac. 305.

^b *Hutchinson v. Stephens*, 1 Keen, 663.

CHAP. XVI. plaintiff must within four weeks after the time for closing the evidence has expired (formerly after publication had passed) obtain and serve a subpoena to hear judgment, otherwise the defendant may move to dismiss the bill for want of prosecution (16th Ord., 8th May, 1845, art. 45; 114th Ord. art. 4; 21 Cons. Ord. r. 1). In order to ensure the one month between the teste and return of the writ, the subpoena ought to be issued on the same day the cause is set down for hearing. The subpoena must be served fourteen days in a country cause, and ten days in a town cause, exclusive of the day appointed for hearing judgment. To render the service effectual, it must be made within twelve weeks after the teste of the writ (16th Ord., 8th May, 1845, art. 1; 28 Cons. Ord. r. 1).

The rules respecting the mode of serving the process of subpoena are the same as those to which allusion has been already made in relation to the former practice of the subpoena to appear and answer.

Hearing of
the cause.

 The foregoing requisites having been attended to, the cause is now put down in the paper of causes for the day, which are taken as they stand in rotation on the registrar's book. On the cause being called on in its turn, the usual course is for the senior counsel for the plaintiff to open the pleadings, who commences by stating his case and the points which are at issue, and argues the same before the court; the plaintiff's evidence is next read, together with such parts of the defendant's answer as are considered favourable to the plaintiff's case. This is done by the plaintiff's leading counsel, or his junior, who follows him. The defendant's counsel then, in like manner, submit their arguments to the court, and read such of the depositions of the defendant's witnesses as are necessary to support his case, but no part of his answer which is met by the plaintiff's replication. The

senior counsel for the plaintiff now replies, and, lastly, CHAP. XVI.
the judge pronounces the decree.

Until the Orders of 26th August, 1841, if the defendant did not appear at the day of hearing, the plaintiff, Orders, 26th Aug. 1841. on producing an affidavit of the service of the subpoena to hear judgment, was entitled to a decree *nisi* against the defendant, which might upon neglect of the defendant be afterwards made *final*: in which case there was no *appeal*,^c although sometimes the Court granted a *re-hearing* upon terms.^d But, by the 44th of the last-mentioned Orders, where a defendant makes default at the hearing the decree is absolute in the first instance, without giving the defendant a day to show cause; and such a decree now has the same force as if it had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant (23 Cons. Ord. r. 12).*

In case the plaintiff does not appear at the hearing, the defendant, on producing an affidavit in court of his having been served with a subpoena to hear judgment, may have the bill dismissed with costs against the plaintiff.

By Order 117, 8th May, 1845, and 23 Cons. Ord. r. 13, Ord. 117, 8th May, 1845. if the plaintiff, after the cause is set down to be heard, procure his bill to be dismissed on his own application—or if, upon its being called on to be heard, the plaintiff makes default, and by reason thereof the bill is dismissed,—such dismissal, unless the court otherwise orders, is to be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

With respect to a decree binding on an infant, there is a difference whether he stands in the condition of plaintiff or defendant in a suit. If he be a plaintiff, he Difference of a decree in respect to an infant plaintiff or defendant.

^c 10 Ves. 30.

^d Vowles v. Young, 9 Ves. 172.

* See 22 & 23 Cons. Ord., as to taking the bill *pro confesso* for want of answer.

CHAP. XVI. is equally bound by a decree as a person of full age ;^e but, where he is the defendant in a cause, he is not conclusively bound by the decree of a court of equity, but must have a reasonable time after he comes of age to show cause against it ; for all infant defendants, by their answer, put in an early claim to the care and protection of the court, as they are unable to take care of themselves.^f And where there was a decree against an infant, omitting to give the usual period of six months to show cause against it after he came of age, such decree was held to be erroneous ;^g and, in another case, it was determined that, where a notice was not given an infant defendant to show cause within six months after he came of age, he might answer anew : and this provision is introduced into decrees from the general superintendency the court has over infants, and therefore all decrees against them allow six months after they come of age to show cause.^{h*}

^e *Gregory v. Molesworth*, 3 Atk. 626 ; *Lightburne v. Swift*, 2 Ball and B. 213.

^f *Effingham v. Napier*, 3 Bro. P. C. 301.

^g *Savage v. Carroll*, 1 Ball and B. 551.

^h *Napier v. Effingham*, 2 P. Wms. 401.

* The existence of this distinction appears to rest upon no solid foundation either in reason or in justice. It is at best but a mere fiction, and the results to an infant plaintiff may be equally disastrous as though he were an infant defendant deprived of the six months for deliberation upon his coming of age. The theory is this, *i.e.* that in the case of an infant plaintiff the court is put into motion both on behalf of himself as well as on behalf of his estate, and that therefore, both the one and the other being brought under the protection of the court, no possible harm can befall either by the court's decree ; whilst on the other hand the infant defendant has no alternative, he must at the instance of a mere stranger be of necessity brought before the court, and therefore it would be hard indeed not to allow him an opportunity after he comes of age of impeaching the decree made against him during his minority. But it must be remembered that, in both cases, notwithstanding the 15 & 16 Vict. c. 86, s. 11, the

When there has been a decree in a foreclosure suit CHAP. XVI. against several defendants, one of whom is an infant, he Foreclosure suit against an infant. cannot be foreclosed without a day to show cause; but if the court has decreed a sale, that binds the infant:ⁱ and in a late case, where there was a decree against the infant heir of an estate, subject to an equitable mortgage, the lord chancellor was of opinion that, as the decree directed the estate to be sold, the infant ought not to be allowed the six months; but that, if the decree had been a foreclosure, the infant ought to have been allowed the six months. And in realizing a mortgage security, where the deviser or heir of the mortgagor is an infant, it is the usual practice of the court to refer it to the chief clerk or judge at chambers, to inquire whether a sale of the mortgaged property will be beneficial to the infant; but where, from the circumstances of the case, it appears to be clear that such a sale would be for the benefit of the infant, the court will direct a sale in the first instance.^k But in a foreclosure suit against an infant, although he

infant plaintiff and infant defendant are equally passive, and in the instance of an infant plaintiff the bill is filed by a next friend, technically so called, who may in reality be an entire stranger to the infant, but who is too often a tool in the hands of a crafty unprincipled individual, who, having planned the whole suit himself, is made defendant in the shape of a trustee or executor, and who being bent upon working out his own schemes is only too happy to indemnify such next friend for his services in thus bringing both the infant and his estate before the Court of Chancery. The fact is, that under the above circumstances an infant plaintiff can no more help being brought into litigation, however unwilling he or his nearest relatives may be, than can an infant defendant; and it seems therefore to be against all claims of justice and common honesty to allow the six months after the defendant has become *sui juris* to impeach an hostile decree in the one case and not in the other.

ⁱ Booth v. Rich, 1 Vern. 295.

^j Scholefield v. Heafield, 7 Sim. 670; 8 Sim. 470.

^k Davis v. Dowding, 2 Keen, 245.

CHAP. XVI. has six months after he arrives at age to show cause, yet he cannot ravel into the account, nor is he so much as entitled to redeem the mortgage by paying what is reported due, but is only entitled to show an error in the decree.¹

If an infant be aggrieved by a decree, he cannot be compelled to stay till he arrives at age, but may apply as soon as he thinks fit to reverse it; and he may do this either by bill of review, re-hearing, or by original bill, alleging specially the errors in the former decree.^m

¹ Mallack v. Galton, 3 P. Wms. 352.

^m Richmond v. Tayleur, 1 P. Wms. 737.

CHAPTER XVII.

MINUTES OF THE DECREE.—RE-HEARING.—PETITION OF
APPEAL.—CAVEAT AGAINST THE DECREE.—BILL OF
REVIEW.

A DECREE is the sentence of the court, and is equal to a judgment at law.^a Decrees are either *interlocutory* or *final*.^b An interlocutory decree is a sentence of the court for the purpose of ascertaining some matter of fact to be tried by a jury, or the opinion of the court, sometimes aided by one of the common-law judges, upon some question of a purely legal nature, before the court of equity will pronounce its final decree.^c A decree is final when it is signed and enrolled.

After the cause has been heard, minutes or heads of the decree are taken down by the registrar in court, and by him delivered out to the several parties to the suit. The minutes being *settled*—which is done by the parties attending before the registrar on a day appointed for that purpose—the decree is *drawn up* by that officer, and delivered out to the party in whose favour such decree is made, and an office copy thereof is taken by the opposite party.

For the sake of rendering the decree perfect, there yet remains, after the minutes have been settled, and the

^a Searle v. Lane, 2 Vern. 88.

^b 3 Pl. 452.

^c 1 Newl. Ch. Pr. 322.

CHAP. XVII.

decree drawn up, to *pass* and *enter* the same in the books kept for that purpose. Passing or signing the decree, is effected by the registrar sending a note in writing to the adverse party's solicitor, stating that the decree will be passed on a certain day mentioned therein, and requiring him to bring his copy and attend at the passing, or in default of such appearance the decree will be passed without him.^d The decree having been passed, is left with the entering-registrar to be *entered* in the books before mentioned, which are afterwards taken to the *report office* for the purpose of easy reference.

The decree, having been passed and entered, cannot be reversed or altered, unless by a re-hearing; and, if it have been signed and enrolled, and it is sought to be remedied on the discovery of new matter, by a bill of review. Where, however, there appears any clerical error in drawing up the decree, or any evident mistake on the face of the schedule to the chief clerk's certificate, the court will not put the party to the form or expense of a re-hearing, but will rectify the decree upon motion.

Re-hearing
before
enrolment.

Wherever a party is dissatisfied with the decree, he may obtain a re-hearing of the cause before any of the judges in whose court it was heard, provided the decree has not yet been signed and enrolled. And, in case the hearing took place before the master of the rolls, or either of the vice-chancellors, the party may obtain a re-hearing before them, or, if he choose, may, by a petition of *appeal*, procure the cause to be heard by the lord chancellor. But, after the decree has been enrolled, the cause can neither be re-heard, nor can the parties appeal to the chancellor's court, because the effect of enrolling a decree is to make it the lord chancellor's decree. If, therefore, either the plaintiff or defendant be desirous to have a

^d 1 Newl. Ch. Pr. 316.

re-hearing, or an appeal to the lord chancellor, but is not sufficiently prepared with his re-hearing or petition of appeal, it is advisable for him to enter a *caveat* against the decree, to prevent it being enrolled; since, after the enrolment, the party aggrieved can only appeal from either of the courts to the House of Lords, where the cause will again be heard, and the decree either altered, reversed, or affirmed, as to them may seem meet, and from which there is no further appeal, except by a bill of review, either upon error apparent or upon new matter, discovered since the expiration of the time for closing evidence in the original cause.^e

CHAP. XVII.
—
Caveat
against
decree.

No appeal lies *directly* from a sentence or decree pronounced in the master of the Rolls Court, or those of the respective vice-chancellors, to the House of Lords; for, if either of the parties be desirous of so appealing, they must first procure such sentence or decree to be signed by the lord chancellor and enrolled, which process, we have seen, constitutes it a decree of his own court. And, it may be here observed that, if the decree were pronounced by any person sitting for the lord chancellor, or by the master of the rolls, at the Rolls, or by the respective vice-chancellors, it must be signed both by the person pronouncing the decree and by the lord chancellor.

Appeal to
House of
Lords.

When a party is desirous of appealing to the House of Lords from the chancellor's decree, he must cause a notice to be given to the agent of the parties respondent of the time when the petition is intended to be presented, and the day of giving such notice must be indorsed by the petitioner's agent on the back of the appeal.^f

Notice of
appeal.

An appeal to the House is exhibited by way of petition, and must be signed by two counsel, who may be either such as were engaged in the cause in the court below, or

Appeal exhi-
bited by way
of petition.

^e Mitf. 88; *Barbon v. Searle*, 1 Vern. 416.

^f House of Lords' Journ., 9th April, 1812.

CHAP. XVII. who are to attend at the bar of the House at the hearing of the appeal, and who must certify that there is reasonable cause of appeal.^g The appeal must be presented within fourteen days, reckoning from the first day of every session or meeting of Parliament after the recess; after which the lords will not receive a petition of appeal during any such sitting, unless upon a decree made whilst the Parliament is actually sitting, in which case the party aggrieved may bring his petition of appeal, provided he present it to the House within fourteen days after such decree is made and entered in any court of equity in England or Wales, twenty days in any of the courts in Scotland, and forty days in any of the courts of equity in Ireland.^h And, by a subsequent Order,ⁱ a limitation is prescribed beyond which parties are not at liberty to present these petitions; for it declares that no petition of appeal from any decree or sentence of any court of equity in England or Ireland, or of any court in Scotland, shall be received after *five years* from the signing and enrolling, or extracting, of such decree or sentence, and the end of fourteen days from and after the first day of the session or meeting of Parliament next ensuing the said five years. But, by the same Order, an exception is made in the case of infants, married women, non-composites, prisoners, and persons out of Great Britain or Ireland, who are allowed to bring their respective appeals within five years next after such disability shall cease, and fourteen days from and after the first day of the session next ensuing the said five years, but not after.

It is now settled in a recent case,^j whatever doubt may

^g House of Lords' Journ., 3rd March, 1697.

^h House of Lords' Journ., 13th July, 1678.

ⁱ House of Lords' Journ., 24th March, 1725.

^j *Andrews v. Walton*, House of Lords, Feb. 17, 1842.

of late years have been entertained to the contrary, that CHAP. XVII.
all decrees and orders of the court, whether final or interlocutory, also those, whether pronounced originally by the lord chancellor, or afterwards affirmed by him upon appeal or re-hearing, require to be enrolled before any appeal can be entertained against him by the House of Lords.

A caveat, when entered, prevents the decree from being signed for one lunar month from the time that it is presented to the lord chancellor for his signature for the purpose of enrolment, and notice thereof given by the chancellor's secretary to the adverse party's solicitor of the docket having been presented for signature.^k The caveat must be entered with the secretary of decrees and injunctions, and will be of no effect unless it be prosecuted within a month from the day on which notice of its being entered was served by the party entering the same on the enrolment officer. Effect of caveat.

A bill of review can only be brought after a decree has been pronounced, and, strictly speaking, not until it has been signed and enrolled.¹

1. If the decree have *not* been signed and enrolled, and the party seek to reverse the same, on facts discovered since the passing of publication in the original cause, his proper course is to present a petition, accompanied with an affidavit, for liberty to file a *supplemental bill in the nature of a bill of review*, which application the court will grant, on the petitioner's depositing £50, as a security to answer such costs and damages as may eventually be awarded to the adverse party, in case the court Supplemental bill in the nature of a bill of review.

^k Richards *v.* Wood, 2 My. and K. 621 ; Robinson *v.* Newdick, 3 Meriv. 13 ; Burnett *v.* Theobald, 1 P. Wms. 609.

¹ Standish *v.* Radley, 2 Atk. 178.

CHAP. XVII. shall think fit to award the same at the hearing of the cause, on such supplemental matter.^m

Re-hearing. If a decree, previous to its being signed and enrolled, be sought to be reversed on error apparent, the party may present his petition of *re-hearing*, and a supplemental bill for the purpose of introducing the new matter discovered since publication: in this instance, the cause will come on to be heard, upon the facts which are made the subject of the supplemental bill, together with a re-hearing of the original cause.ⁿ

Bill of review.

2. If the party be desirous of reversing a decree which is already signed and enrolled, either on account of some error in law, apparent on the face of the decree (in which case there needs no application to the court),^o or of some new facts discovered subsequently to passing publication in the former cause, he cannot have a re-hearing thereof, but he must file his *bill of review*. In the latter instance it is necessary for the party seeking his remedy to make application to the court,^p which is done, as in the former instance mentioned in this chapter, by petition, accompanied by an affidavit, showing the party's title, and that the new matter was not known to him at the time of pronouncing the decree, and that he could not, by reasonable diligence, have obtained a knowledge thereof at the time for closing evidence has expired, or at any period when he could have availed himself of it pending the former suit.^q

Difference between a re-hearing and an appeal.

The rule of evidence is widely different, whether it applies to a re-hearing or an appeal; for all the evidence which was capable of being given at the time of the

^m Beav. Ord. 368.

ⁿ Perry v. Phillips, 17 Ves. 178.

^o Ibid. Mitf. 84.

^p Ibid.

^q Young v. Keighley, 16 Ves. 350; Wortley v. Birkhead, 2 Ves. 57.

original hearing, although not actually produced, is ad- CHAP. XVII.
missible at the re-hearing; whereas, in an appeal, that
evidence only which was really given at the hearing is
admissible.^r

^r Lovell v. Hicks, Sittings at Gray's Inn, Feb. 15, 1837.

CHAPTER XVIII.

ISSUE AT LAW, AND REFERENCE TO CHAMBERS UNDER AN INTERLOCUTORY DECREE.—PROCEEDINGS IN CHAMBERS.—CHIEF CLERKS' CERTIFICATE.—DIRECTIONS.—FURTHER DIRECTIONS.—FINAL DECREE.

Judge sometimes directs an issue to try a fact, or determine a question of law.

It not unfrequently happened after a cause had come on to a hearing, that the judge would suspend the decree, and, previous to his pronouncing judgment, direct an issue to determine a particular fact, or, until recently, by operation of the new practice, under the 15 & 16 Vict. c. 86, s. 61, a question of law, to be tried and settled before a court of ordinary jurisdiction, for the purpose of rendering more complete justice between the parties, and at the same time, of more clearly informing the conscience of the court thereupon. After the issue had been tried, and a verdict given, or the legal point settled by the court to which it was referred, and the record completed, the cause was then set down to be heard on the further directions reserved by the decree; which was done by representing a petition of course, containing the order of the decree, as to the reference, the verdict, or sentence of the court of law, and praying that the cause might be set down for hearing on further directions, and costs reserved: an order was drawn up on the petition, and the cause was then set down on further directions and costs.

But by virtue of the above-mentioned Act, the Court of Chancery shall have full power to determine any questions of law which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties. CH. XVIII.

Also by the Chancery Amendment Act, 21 & 22 Vict. c. 27, it is enacted that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit to award damages to the party injured, in addition to or in substitution for such injunction or specific performance, and such damage may be assessed in such manner as the court shall direct (sec. 2). The court may also, if it see fit, cause the amount of such damages in any case to be assessed, or any question of fact arising in any such, or proceeding to be tried by a special or common jury before the court itself (sec. 3). Damages may also be assessed or questions of fact tried before the court itself without a jury (sec. 5).

But the court still reserves to itself the power of directing an issue of fact to be tried in a court of common law before a jury.

Where the Court of Appeal on an interlocutory motion suggests that the cause is a proper one to be heard before the vice-chancellor with the assistance of a common-law judge, the vice-chancellor will make an order to that effect on motion.^a

As before observed (p. 428), the court will sometimes, Bill retained
to determine

^a *Hughes v. Chester and Holyhead Railway Company*, 8 Week. Rep. 337.

CH. XVIII. party's right at law. on the hearing of the cause, direct the bill to be retained for a certain time, giving the party whose interests are disputed liberty to bring his action for the purpose of ascertaining his rights at law; and, when the *legal* right is once established before the proper jurisdiction, the Court of Chancery will, thereupon, give such *equitable* relief to the party in whose favour the verdict was given, as he shall be found to be entitled to.

Matter must be tried according to rules of law.

When, at the hearing of a cause, the bill is retained for a year, with leave for the plaintiff to bring such an action as he may be advised,^b the party having to establish his legal right by the action proceeds to do so according to the rules of law; and this court looks only at the final result, and not at any of the proceedings at law: nor is the party entitled, on the equity reserved, to a greater relief than was given him at the hearing. But when an issue suit is tried, for the purpose of satisfying the conscience of the court, there the court may look at the nature of the proceedings which may have taken place at the trial at law.

If neither of the parties can agree as to the issue for a jury, or the manner in which a case is to be made out on a question at law, both points must be settled in chambers in compliance with the ordering part of the decree.

Certain accounts directed to be taken before hearing.

Under the Orders in Chancery, 9th May, 1839,^c where it appears that certain preliminary accounts and inquiries must be taken and made, before the rights of the parties to the cause can be ascertained, or questions arising therein can be determined, the plaintiff may, at any time after the defendant's appearance, upon motion with notice, obtain an order, referring it to the master, (which would now be to the chief clerk,) to make such inquiries,

^b *Smith v. Lord Effingham*, 2 Law Times, 61.

^c Order 5th; 20 Cons. Ord.

and to take such accounts, without prejudice to any question in the cause, provided it appears to the court that the same will be beneficial to any party to the cause, who may not be able to consent thereto, and that the same is consented to by any of the defendants who are competent to consent, but who have not yet put in their answer to the bill, and that the same is consented to by, or as proper to be made upon, the statements contained in the answers of any of the defendants who may have answered the bill. CH. XVIII.

The most usual reference after an interlocutory decree was to a master in chancery; but the points which formed the subject of such a reference are too numerous and diversified to be stated here,—the matters upon which inquiries were directed to be made before the master and noted to the judge at chambers or his chief clerk, by virtue of the 15 & 16 Vict. c. 80 (the Masters in Chancery Abolition Act) being almost as multifarious as the questions which are made cognizable in the court itself, and mainly depending upon the position in which the parties are placed at the hearing, the circumstances involved in each particular case, and the consequent direction of the court in respect thereof. The principal subjects however for which applications are to be made at chambers are, under the above Act, for time to plead, answer, or demur; for leave to amend bills or claims; for enlarging publication;* for the production of documents relating to the conduct of suits or

What matters are referred to the master.

* This ought to be read in connection with s. 38 of the 15 & 16 Vict. c. 86, and Ord. 32, 7th Aug. 1852, which is based upon that section; and it will be seen, that instead of an application for enlarging publication, it ought to be, "an application to enlarge the time for closing the evidence." This latter practice is intended as a substitute for the former, as the evidence will no longer be kept a secret.

CH. XVIII. matters—as to the guardianship and maintenance of infants—on matters connected with the management of property—and on such other matters as each said judge may from time to time see fit, or as may from time to time be directed by any general order of the lord chancellor.

As to the Course of Proceeding at Chambers.

Any of the judges in equity, when sitting in open court, may adjourn for consideration in chambers any matter which in the opinion of such judge may be more conveniently disposed of there; or, when sitting in chambers, to direct any matter to be heard in open court which they may think ought to be so heard (sec. 27).

This provision will greatly tend to obviate the delay and expense of drawing up an order and getting it passed and entered at the registrar's office. Such also is the object of sec. 32 of the Act.

The mode of proceeding before the respective judges at chambers will be by summons, or, as near as may be, according to the form now adopted by the judges of the superior courts of common law when sitting at chambers (sec. 28); which form of summons is set out in the schedule to Orders, Oct. 16, 1852.

By sec. 29, sole power is given to the judges (subject to any rules which may be made by the lord chancellor with the advice and assistance of them or any two of them) to order what matters and things shall be investigated by their chief clerks, either with or without their direction, during their progress, and what matters and things are to be heard and investigated by themselves: and in particular, if the judge shall so direct, his chief clerks shall take accounts, and make such inquiries as have usually been prosecuted before the chief clerks of the present masters. And the judge is to give aid and di-

rections in every or any such account or inquiry as he may think proper, but subject to the right provided for the suitor in sec. 33 to bring any particular point before the judge himself. CH. XVIII.

The object of the Legislature, as before hinted at, in passing this Act, was by one vigorous measure to remedy that fearful expenditure of the suitor's property and time, in a lengthened chancery suit, by at once sweeping away the causes of it. No theorist can well imagine the almost interminable disasters to individual suitors on account of the proverbial delays and vexatious proceedings in the masters' office, arising from references, reports, exceptions to reports, etc., which however are now to be obviated by making the entire suit to be worked out by the judge himself before whom the cause is set down, and assisted by the chief clerk—who is to aid him during the progress of the suit, not in any judicial capacity but in that of practical detail. The chief clerk does not therefore take the place which the master formerly occupied relation to the judge, whom he assisted both in a judicial as well as a mechanical character; for the latter is only intended to be exercised by the chief clerk, whilst the former is merged in the judge himself (see also sec. 37).

Each chief clerk shall, for the purpose of any proceedings directed by the judges to be taken before him, have full power to issue advertisements to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments (other than acknowledgments by married women), to receive affirmations, and, when so directed by the judge to whose court he is attached, to examine parties and witnesses, either upon interrogatories or *vivâ voce*, as such judge shall direct (sec. 30); and parties and witnesses so summoned neglecting to attend shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedi-

CH. XVIII. ence to any order of court; and for any wilful and corrupt false swearing or affirming shall be liable to the same penalties, punishments, and consequences as if it had been sworn and affirmed before any person now by law authorized to administer oaths, to take affidavits, and to receive affirmations (sec. 31).

No particular form is required for the directions to be given by any of the judges to the chief clerk touching any proceeding before him; but the result of such proceedings shall be stated in the shape of a short certificate to the judge, and shall not be embodied in the formal report unless the judge shall so direct; and when the judge shall approve of such certificate or report, he shall sign the same in testimony of his adopting it (sec. 32).

The ordinary practitioner will easily perceive the effect of this clause, which is to sweep away all those almost interminable state of facts and evidence which had hitherto been characteristic of the master's report; for all the proceedings and statements of facts being before the court itself, there will be no necessity for further information in the shape of a report.

No exceptions are to be taken to any certificate or report of the chief clerk, although signed or adopted by the judge; but any party may, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded and before the certificate or report shall have been signed and adopted as the lord chancellor shall by any general order direct, be at liberty to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding when it is brought by the chief clerk to a conclusion (sec. 33).

This section must be read in connection with the 29th

section. The importance of these two provisions in the Act will not at first sight appear except to the experienced practitioner. He will at once perceive the great improvement here intended to be introduced, namely, that whenever a particular question should arise upon taking an account or an inquiry whose decision may influence and determine the manner in which the remainder of either the inquiry or the account ought to be taken, the judge himself may dispose of such question, instead of the former tedious and expensive process of taking the whole account of the whole inquiry. It was this strange practice which formed one of the crying grievances of the masters' office. CH. XVIII.

When any certificate or report of the chief clerk shall have been signed and adopted by the judge, the same shall be filed in like manner as reports were filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied either at chambers or in open court, according to the nature of the case, upon application by *summons* or *motion* within such time as shall be prescribed in that behalf by any general order of the lord chancellor; but the court is empowered at any time to open such certificate or report, upon the same or the like grounds as any report of a master which had been absolutely confirmed might have been opened (sec. 34.)

The 13th, 14th, and 15th sections of the 3 & 4 Wm. IV., which empowers the masters to make orders for time to answer for leave to amend bills and to enlarge publication, are repealed (secs. 26 and 35). And all the powers, authorities, and jurisdiction given to the masters by any Act then in force are to be exercised by the judges (sec. 36). And further, the powers given to the masters by secs. 7, 8, and 9 of this Act may be exercised by the judges with respect to causes, matters, and things which

CH. XVIII. may be depending before them respectively in chambers ; and if any such judge shall be of opinion that any cause, matter, or thing so depending ought to be finally disposed of, unless the parties, or some of them, can show good cause to the contrary, he shall direct the same to stand in his paper in open court, giving such notice thereof, if any, as he shall deem right, and proceed to dispose thereof accordingly (sec. 37).

Power is given to the lord chancellor, with the consent and advice of the other equity judges, or any two of them, to issue general rules and orders for regulating the times and form and mode of procedure before the judges sitting at chambers and their respective chief clerks ; and generally the practice of the court in respect of the matters to which this Act relates ; and for regulating the fees and allowances to solicitors of the court in respect to such matters, and also the fees to be payable by suitors of the court to the officers thereof in respect of the business to be conducted before the judges sitting at chambers and their respective chief clerks ; and all such rules and regulations may be from time to time rescinded, altered, varied, or added to by the like authority, and are to take effect as general orders of court. And it is provided that no greater amount of fees is to be payable by the suitors in respect of such business than is now paid in respect of similar and analogous business in the masters' offices (sec. 38).

Sec. 40 enables the respective judges sitting at chambers to receive and act upon the opinion of conveyancing counsel, in actual practice, with regard to such matters wherein the masters had hitherto been in the habit of requiring such opinion for their aid in the investigation of the title to an estate, with liberty for any party to object to such opinion when he shall deem it open to objection, and thereupon the point in dispute shall

be disposed of by the court or by the judge sitting in CH. XVIII.
chambers.^d

By sec. 41 the lord chancellor is empowered to nominate no less than six conveyancing counsel, of not less than ten years' standing, in actual practice, to be such conveyancing counsel for the purposes mentioned in sec. 40.

Any judge may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to assist him in any matter at issue in any cause or proceeding, and to act upon the certificate of such persons (sec. 42).

Sec. 60 allows the lord chancellor six weeks after he has resigned to deliver the registrar a written judgment when he has already fully heard the case.

The several chancery judges have recently agreed to and adopted the following resolutions as to chamber practice:—

The following are the applications to be made at chambers, viz.:

1. As to the guardianship of infants (except the appointment of guardian *ad litem*).
2. For the appointment of special guardian to concur in a special case.
3. As to maintenance or advancement of infants.
4. Under the Drainage Act.
5. For the administration of estates under the Act of 15 & 16 Vict. c. 86.
6. Under the Legacy Duty Act for payment of money out of court.
7. For time to plead, answer, or demur.
8. For leave to amend bills or claims.
9. For enlarging publication or the time for closing evidence.

^d *Re Caddick*, 20 Law Times, 59.

CH. XVIII.

10. For the production of documents.
11. Relating to the conduct of suits or matters.
12. As to matters connected with the management of property.
13. For payment into court of purchasers' moneys under sales of the court, and investing the same.
14. For stop orders where the assignor and assignee concur.
15. Applications for renewals of leases.^e
16. References authorized by a private Act to be taken before a master in chancery.^f
17. In cases of arbitration to appoint an umpire under the Common Law Procedure Act, 1854.^g
18. By Order 12th Nov. 1856, applications under 10 & 11 Vict. c. 96, "An Act for better securing Trust Funds and for the Relief of Trustees," and the 12 & 13 Vict. c. 74, "An Act for the further Relief of Trustees," in all cases where the trust fund does not exceed £300 cash or £300 stock.
19. Applications under "The Trustee Act, 1850," and 15 & 16 Vict., "An Act to Extend the Powers of the Trustee Act, 1850," in all cases where any decree or order shall have been made by the court for the sale or conveyance of land.
20. By executors or administrators for protection under the 23 & 24 Vict. c. 38, s. 14 (*vide* 35 Cons. Ord.).
21. Under Order, 5th Feb. 1861, to take evidence *viva voce* at the hearing.

Advertising
for creditors,
etc., general
and peremp-
tory.

There is generally in the ordering part of the decree a direction to advertise. This is done for the purpose of inducing creditors to come in and prove their debts within

^e Beckford v. Chalker, 1 Eq. Rep. 236 ; 21 Law Times, 192.

^f Thornhill v. Thornhill, 18 Jur. 31 ; Week. Rep. 459.

^g 17 & 18 Vict. c. 125, s. 12.

a certain time, or for the heir-at-law or next of kin to CH. XVIII.
prefer their respective claims in chambers.

It will be seen, by referring to the 28th sec. of the 15 & 16 Vict. c. 80, that one object of the Act was to introduce the practice of summons as a mode of proceeding before the judges at chambers; this method was accordingly directed to be henceforth adopted by the Orders of Chancery, 16th Oct. 1852. The summonses are twofold—the one general, and relates to all the proceedings at chambers, whether originating at chambers or not; and the other of a more special character, and has reference only to the issuing advertisements and summoning witnesses.

As these Orders point out the new proceedings which are adopted in lieu of the former business in the masters' office, and are intended to supersede the cumbrous and dilatory machinery of warrants, objections, exceptions, etc., they will best convey their own meaning by being set out verbatim and according to their numerical order.

Summons.

I. The summons for the purpose of proceedings before the master of the rolls and vice-chancellors respectively at chambers, whether originating in chambers or not, may be in a form similar to the form set forth in Schedule (A) to these Orders, with such variations as the circumstances of the case may require.

II. The summons to be issued under sec. 30 of the Act of 15 & 16 Vict. c. 80, may be in a form similar to the form set forth in Schedule (B) to these Orders, with such variations as the circumstances of the case may require.

CH. XVIII. III. A seal is forthwith to be provided for the chambers of the master of the rolls and each of the vice-chancellors, and summonses are to be prepared by the parties, and sealed by one of the clerks, at the chambers of the judge from whose chambers they are issued, and a copy of such summons is to be left at the judge's chambers by the party obtaining such summons.

IV. In cases of applications under 15 & 16 Vict. c. 86, s. 45, applications for guardianship and maintenance of infants, originating in chambers, and of all other applications originating in chambers, a duplicate of the summons is to be filed in the record and writ office; and in cases where service is required, the copies served are to be stamped in the manner provided by sec. 46 of the Act of 15 & 16 Vict. c. 86.

V. In cases where proceedings originate in chambers, the original summons is to be served seven clear days before the return thereof. All other summonses, not being summonses referred to in Order II., are to be served two clear days before the return thereof.

VI. In cases where proceedings originate in chambers, and where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge; and such indorsements are to be sealed at the judge's chambers, and the service of the copy so indorsed and sealed is to have the same force and effect as the service of an original summons; and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.

Appearances.

VII. In all cases where proceedings originate in chambers, the parties served are, before they are heard in chambers, to enter appearances in the record and writ office, and give notice thereof.

Orders and Directions applicable to all cases, whether originating in Chambers or not.

VIII. In all cases in which by any order any accounts are directed to be taken, or inquiries to be made, each direction shall be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number, and such order may be in the form set forth in Schedule (C) to these orders, with such variations as the circumstances of the case may require.

IX. Where an order is made directing an account of debts, claims, or liabilities, or an inquiry for next of kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the order.

X. Where an order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is to be computed on such debts as to such of them as carry interest after the rate they respectively carry ; and as to all others, after the rate of four per cent. per annum, from the date of the order.

XI. Where an order is made directing an account of legacies, unless otherwise ordered, interest is to be computed on such legacies after the rate of four per cent. per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of in-

CH. XVIII. terest is directed by the will, and in that case according to the will.

XII. Where an order is made directing any property to be sold, unless otherwise ordered, the same is to be sold with the approbation of the judge to whose court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by such judge, and all proper parties are to join therein as such judge shall direct.

XIII. Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed is first to give security, to be allowed by the judge to whose court the cause is attached, and taken before an officer or agent of the court in the country, if there shall be occasion, duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, at such periods as such judge shall appoint, and to account for and pay the same as the court shall direct, or as the case may be, to be answerable for what he shall receive in respect of the personal estate, for the getting in and collection of which he is to be appointed, and to account for and pay the same as the court shall direct; and the person so to be appointed is to be allowed a proper salary for his care and pains in receiving such rents and profits, or, as the case may be, to have an allowance made to him in respect of his collecting such personal estate.

XIV. The general orders of the court with respect to receivers shall, *mutatis mutandis*, apply to receivers appointed under orders made after these rules and regulations come into operation.

XV. Recognizances which have been heretofore given to the master of the rolls and the senior master in ordinary, are hereafter to be given to the master of the rolls and the senior vice-chancellor for the time being.

Proceedings in Chambers.

XVI. In all cases where matters, in respect of which summonses have been issued, are not disposed of upon the return of the summons, the parties are to attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter.

XVII. In all cases of proceedings in chambers under any order, the solicitor prosecuting the same shall leave a copy of such order at the judge's chambers, and shall certify the same to be a true copy of the order as passed and entered.

XVIII. Upon a copy of the order being left, a summons is to be issued to proceed with the accounts or inquiries directed; and upon the return of such summons, the judge is to be satisfied by proper evidence that all necessary parties have been served with notice of the order; and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to, as may be found necessary.

XXI. If, upon the hearing of the summons, it shall appear to the judge that, by reason of absence, or for any other sufficient cause, the service of notice of the order upon any party cannot be made, or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service; or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service.

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XX. If, in the prosecution of the order, it shall appear to the judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly; or, if desired by any party, may direct the same to be considered in open court.

XXI. At the time any summons or appointment is obtained, an entry thereof is to be made in a book, called the "Summons and Appointment Book," stating the date on which the summons is issued or appointment made, the name of the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time returnable.

XXII. Lists of matters appointed for each day are to be made out and affixed outside the doors of the chambers of the respective judges, and, subject to any special direction, such matters are to be heard in the order in which they appear in such list.

XXIII. The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motions. No states of facts, charges, or discharges are to be brought in. But when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, are to be supplied for the use of the judge and his chief clerk; and, where so directed, copies are to be handed over to the other parties. But no copies to be made of deeds or documents where the originals can be brought in, without special direction.

XXIV. The party intending to use any affidavit on any proceeding in chambers is to give notice to the other parties concerned of his intention in that behalf.

XXV. The practice of the court with respect to evidence before the hearing, when applied to evidence to be taken before an examiner in any cause subsequently to

the hearing, is to be subject to any special directions CH. XVIII. which may be given in any particular case.

XXVI. Where a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before the examiner, subject to any special directions which may be given in any particular case.

XXVII. The original examinations and depositions of parties and witnesses taken by or before the chief clerk, authenticated by his signature, are to be transmitted by him to the record and writ office, to be there filed; and any party to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee.

XXVIII. All orders made in chambers, and drawn up by the chief clerks or registrars, are to be entered in the same manner and in the same office as orders made in open court are entered.

XXIX. Where any account is directed to be taken, the accounting party is, unless the judge shall otherwise direct, to make out his account and verify the same by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the judge's chambers.

XXX. Any party seeking to charge any accounting party beyond what he has by his account admitted to have received is to give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner.

XXXI. Upon a receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon is to be taken out; and the account, when passed,

CH. XVIII. is to be entered by the solicitor of the receiver in books, in the same manner as heretofore; but the affidavit verifying the account so passed is to refer to it as an exhibit, and not to be annexed to it.

XXXII. When a receivership has been completed, the book containing the accounts is to be deposited in the record and writ office.

XXXIII. Where advertisements are required for any purpose, a peremptory and only one is to be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed.

XXXIV. The advertisements are to be prepared by the solicitor, and submitted to the chief clerk for approval, and, when approved, are to be signed by him, and such signature is to be sufficient authority to the printer of the *Gazette* to insert the same.

XXXV. Advertisements for creditors or other claimants are to fix a time for the creditors or claimants to come in and prove their claims, and to appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in schedule (D) to these orders, with such variations as the circumstances of the case may require.

XXXVI. Claimants coming in pursuant to advertisement are to enter their claims at the chambers of the judge in the "Summons and Appointment Book," for the day appointed for hearing by the advertisement, and are to give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims.

XXXVII. The claimants filing affidavits are not to be required to take office copies; but the party prosecuting the cause or matter is to take office copies, and produce

the same at the hearing, unless otherwise ordered in CH. XVIII. chambers.

XXXVIII. If on the day appointed for hearing the claims, there are any not then disposed of, an adjournment-day for hearing such claims is to be fixed; and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced.

XXXIX. Any claimant who has not before entered his claim, may be heard on such adjournment-day, provided he enters his claim and files his affidavit four clear days prior to such day, and no certificate of debts or claims shall in the meantime have been made.

XL. Creditors claiming debts not exceeding £5 need not attend on the day of hearing, unless required to do so by notice from some party.

XLI. After the time fixed by the advertisement, no claims are to be received except as before provided, in case of an adjournment, unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit.

XLII. A list of all claims allowed shall, when required by the judge, be made out and left in the judge's chambers by the party prosecuting the order.

XLIII. In cases where the court directs any computation of interest, or the apportionment of any fund, which is to be acted upon by the accountant-general or other person, without any further order from the court, the order to be made by the court may direct such computation or apportionment to be made by one of the chief clerks attached to the court of such judge, and may direct the certificate thereof, signed by such chief clerk, to be

CH. XVIII. acted upon accordingly, without the same being signed and adopted by the judge.

XLIV. Where an account has been directed, the certificate or report is to state the result of such account, and not to set the same out by way of schedule, but is to refer to the account verified by the affidavit filed, and to specify by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and to state what additions, if any, have been made by way of surcharge. In any case in which the account verified by the affidavit has been so altered, that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the solicitor prosecuting the order, and is then to be referred to by the certificate or report. The accounts and the transcripts, if any, referred to by certificates or reports, are to be filed therewith, but no copies thereof are to be required to be taken by any party.

XLV. The certificates or reports to be made by the chief clerk to the judge are not, except the special circumstances of the case shall render it necessary, to set out the order, or any documents or evidence or reasons, but are to refer to the order, documents, and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate or report is founded.

XLVI. The certificate of the chief clerk to the judge may be in a form similar to the form set forth in schedule (E) to these orders, with such variations as the circumstances of the case may require; and when prepared and settled, it is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and is then to be signed by the chief clerk, at an adjournment to be made for that purpose. But where, from the nature of the

case, the certificate can be drawn and copied in chambers CH. XVIII.
whilst the parties are present before the chief clerk, the
same shall be then completed and signed by him without
any adjournment.

XLVII. The time within which any party is to be at liberty to take the opinion of the judge upon any proceeding which shall have been concluded, but as to which the certificate or report of a chief clerk shall not have been signed and adopted by the judge, is to be four clear days after the certificate or report shall have been signed by the chief clerk.

XLVIII. Any party desiring to take the opinion of the judge, as mentioned in the last preceding rule, is within four clear days after the certificate or report shall have been signed by the chief clerk, to obtain a summons for such purpose.

XLIX. At the expiration of four clear days after the certificate or report shall have been signed by the chief clerk, if no party has in the meantime obtained a summons to take the opinion of the judge thereon, the chief clerk is to submit the certificate or report to the judge for his approval, and the judge may thereupon, if he approve the same, sign such certificate or report in testimony of his adoption thereof as follows:—"Approved, this day of ."

L. The certificate or report, when signed by the judge, with the accounts, if any, to be filed therewith, is to be transmitted by the chief clerk to the report office, to be there filed.

LI. The time within which an application may be made by summons or motion to discharge or vary any certificate or report which has been signed and adopted by the judge sitting in chambers, is to be eight clear days after the filing of such certificate or report.

LII. Certificates of the chief clerk, made as men-

CH. XVIII. tioned in Rule XLIII., and not required to be signed and adopted by the judge, are to be transmitted and filed in the same manner as those signed and adopted by the judge.

LIII. The Orders XLVII., XLVIII., XLIX., and LI., are not to apply to certificates on passing receivers' accounts. Such certificates may be approved and signed by the judge without delay ; and, upon being so signed, are to be filed and forthwith acted upon.

LIV. A register is to be kept of all proceedings in the judge's chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at any hearing.

LV. Parties attending any proceedings in chambers, without having obtained the previous leave of the judge to attend the same, are not to be allowed any costs of such attendance, unless by special order of the court.

LVI. The costs of counsel attending the judge in chambers are not in any case to be allowed, unless the judge certifies it to be a proper case for counsel to attend.

Deposit of Deeds.

LVII. Where any deeds or other documents are ordered to be left or deposited, the same are to be left or deposited in the record and writ office, and are to be subject to such directions as may be given for the production thereof.

Power of Judge.

LVIII. Powers and authorities given to the masters in ordinary of the Court of Chancery, by any general order or orders of the court, may be exercised by the judge sitting in chambers.

LIX. The power of the court and of the judge sitting CH. XVIII.
in chambers to enlarge or abridge the time for doing any
act or taking any proceeding, and to give any special di-
rection as to the course or proceeding in any cause or
matter, is unaffected by these Orders. (35 Cons. Ord. rr.
3 to 62 inclu.)

Interpretation.

LX. In these Orders the following words have the
several meanings hereby assigned to them over and above
their several ordinary meanings, unless there be some-
thing in the subject or context repugnant to such con-
struction, viz. :—

1. Words importing the singular number include the
plural number, and words importing the plural number
include the singular number.

2. Words importing the masculine gender include fe-
males.

3. The word “party” includes a body politic or corpo-
rate.

4. The word “affidavit” includes affirmation.

5. The word “order” includes decree and decretal
order.

6. The word “receiver” includes consignee and ma-
nager.

(Signed)

ST. LEONARDS, C.

JOHN ROMILLY, M. R.

G. J. TURNER, V.-C.

RICHARD T. KINDERSLEY, V.-C.

CH. XVIII.

SCHEDULE (A.)

FORM OF SUMMONS.

In Chancery.

In the matter of John Thomas, an infant, *or*
Joseph Wilson
against
William Jackson.

Let all parties concerned attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex], *or*, [at No. , Square, Lincoln's Inn, Middlesex], on the day of , at of the clock in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application*].

Dated this day of 1852.

JOHN ROMILLY, Master of the Rolls, *or*,
GEORGE JAMES TURNER, Vice-Chancellor, *or*,
RICHARD T. KINDERSLEY, Vice-Chancellor, *or*,
JOHN STUART, Vice-Chancellor.

This summons was taken out by A. B., of Lincoln's Inn, in the county of Middlesex, solicitors for
To

The following note to be added to the original summons where proceedings originate in chambers; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above-mentioned [*or, at the place above-mentioned, at the time mentioned, in the indorsement hereon*], such order will be made, and proceedings taken, as the judge may think just and expedient.

N.B.—*The form of summons to be obtained under section 45 of the Act 15 & 16 Vict. c. 86, is prescribed by Rule XLII. of the Orders of 7th August, 1852.*

SCHEDULE (B.)

CH. XVIII.

FORM OF SUMMONS BY CHIEF CLERK.

In Chancery.

In the matter of the estate of John Thomas, late of
 , in the county of deceased, *or*

Joseph Wilson

against

William Jackson.

The defendant, William Jackson [*or* A. B., of, etc.], is hereby summoned to attend at the chambers of the master of the rolls [*or* vice-chancellor], in the Rolls Yard, Chancery Lane, or No. , Square, Lincoln's Inn, Middlesex, on the day of , at of the clock in the noon, to be examined [*or* to be examined as a witness on the part of the] for the purpose of the proceedings directed by the master of the rolls [*or* the said vice-chancellor] to be taken before me.

Dated this day of 1852.

A. B., chief clerk.

This summons was taken out by A. and B., of Lincoln's Inn, in the county of Middlesex, solicitors for .

SCHEDULE (C.)

FORM OF ORDER.

This court doth order that the following accounts and inquiries be taken and made: that is to say,

1. An account of the personal estate, not specifically bequeathed, of A. B. deceased, the testator in the pleadings named, come to the hands of, etc.

2. An account of the said testator's debts.

3. An account of the said testator's funeral expenses.

CH. XVIII.

4. An account of the said testator's legacies.

5. An inquiry what parts (if any) of the said testator's personal estate are outstanding or undisposed of.

And it is ordered, that the said testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a course of administration, and then in payment of his legacies.

And it is ordered, that the following further accounts and inquiries be taken and made : that is to say,

6. An inquiry what real estate the said testator was seised of or entitled to at the date of his will and at the time of his death.

7. An inquiry what incumbrances affect the said testator's real estate.

8. An account of the rents and profits of the said testator's real estate received by, etc.

9. And it is ordered, that the said testator's real estate be sold.

And it is ordered, that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

SCHEDULE (D.)

FORM OF ADVERTISEMENT.

Pursuant to a decree or order of the High Court of Chancery, made in a cause

against

the creditors of [or *persons claiming debts, or liabilities affecting the estate of, or the persons claiming to be next of kin to, or the heir of, as the case may be*], late

of , in the county of , who died in or about the month of , are, by their solicitors, on or before the day of , to come in and

prove their debts or claims at the chambers of the master CH. XVIII.
of the rolls, in the Rolls Yard, Chancery Lane [*or* of the
vice-chancellor , No. , Square, Lincoln's
Inn], Middlesex, or in default thereof they will be pe-
remptorily excluded from the benefit of the said decree
[*or* order].

Monday, the day of at
o'clock in the noon, at the said chambers, is ap-
pointed for hearing and adjudicating upon the claims.
Dated this day of , 1852.

A. B., chief clerk.

SCHEDULE (E.)

FORM OF CERTIFICATE OF CHIEF CLERK.

In the matter of , [*or*, Between . [*State title.*] In pursuance of the directions given to me by the master of the rolls [*or* the vice-chancellor], I hereby certify, that the result of the accounts and inquiries which have been taken and made, in pursuance of the order in this cause, dated the day of , is as follows:—

1. The defendants, , the executors of , the testator, have received personal estate to the amount of £ , and they have paid, or are entitled to be allowed on account thereof, sums to the amount of £ , leaving a balance due from [*or to*] them of £ , on that account.

The particulars of the above receipts and payments appear in the account marked , verified by the affidavit of , filed on the day of , and which account is to be filed with the certificate, except that in addition to the sums appearing on such account to have been received, the said defendants are charged with the following sums [*state the same here, or*

CH. XVIII. *in a schedule*], and except that I have disallowed the items of disbursement in the said account numbered and .

[*Or in cases where a transcript has been made.*]

The defendants, , have brought in an account, verified by the affidavit of , filed on the day of , and which account is marked , and is to be filed with this certificate. The account has been altered, and the account marked , and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the schedule hereto, and, with the interest thereon and costs mentioned in the schedule, are due to the persons therein named, and amount altogether to £ .

3. The funeral expenses of the testator amount to the sum of £ , which I have allowed the said executors in the said account of personal estate.

4. The legacies given by the testator are set forth in the schedule hereto, and, with the interest therein mentioned, remain due to the persons therein named, and amount altogether to £ .

5. The outstanding personal estate of the testator consists of the particulars set forth in the schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the schedule hereto.

7. The incumbrances affecting the said testator's real estate are specified in the schedule hereto.

8. The defendants have received rents and profits of the testator's real estate, etc. [*in a form similar to that provided with respect to the personal estate.*]

9. The real estates of the testator directed to be sold

have been sold, and the purchase money, amounting altogether to £ , has been paid into court. CH. XVIII.

N.B.—*The above numbers are to correspond with the numbers in the decree.*

After each statement the evidence produced is to be stated as follows:—

The evidence produced on this account [*or inquiry*] consists of the probate of the testator's will, the affidavit of A. B. filed , and paragraph No. of the affidavit of C. D. filed.

(Signed) ST. LEONARDS, C.
JOHN ROMILLY, M. R.
G. J. TURNER, V.-C.
RICHD. T. KINDERSLEY, V.-C.

Here it may be necessary to observe that whenever a cause is set down for further directions and costs, it is only where there has been a decree or a decretal order, and after the chief clerk's certificate has received the judge's signature or adoption. This must be done by the plaintiff presenting a petition to the court in which the cause is intended to be heard; and the opinion of the court may at the same time be taken upon any question arising out of the proceedings at chambers before the chief clerk's certificate shall have been signed or adopted by the judge. On the hearing of a cause on further directions, the court cannot do anything, the result of which will be to alter or vary the decree or order made on the original hearing.^h As to further directions and costs.

When the cause comes on again to be considered by the court upon the chief clerk's certificate for further directions, it will generally determine the rights of the parties, and make such order as will conclude the whole

^h Pritchard v. Draper, 1 R. and M. 198.

CH. XVIII. suit; but where, at the hearing for further directions, the court sees fit before making a final decree to direct subsequent inquiries to be made at chambers, it will reserve all subsequent directions until the chief clerk shall have made his further certificate, which being done, and the court satisfied therewith, a final decree will be pronounced, which can only be altered or reversed by means of a re-hearing or appeal, as before observed.

Special Case.—The statute 13 & 14 Vict. c. 35, called “Sir George Turner’s Act,” has already been adverted to in the introduction, where it was mentioned generally, under what circumstances, and by whom a special case may be brought before the court. We may now observe that with a view to obviate the expense and delay consequent upon the old rule of the court, that equity “does not deal out justice by halves, nor execute trusts partially,” which sometimes rendered it impossible to reach the main point really at issue, without incumbering the suit with matters respecting which no one sought the interference of the court, the above Act was passed to enable parties concurring in a special case, and without any further pleading, to determine the question at issue, without proceeding to administer any relief consequent thereon.

By section 30 of the above Act the lord chancellor is empowered, from time to time, to make, rescind, and alter general rules and orders for effectuating the purposes of the Act, and for regulating the terms and the form and mode of procedure and generally the practice of the court in respect of the matters to which the Act relates. And in the meantime and until any such general rules or orders shall be made, and in so far as the same when made shall not be applicable, the proceedings under the Act shall be governed and regulated by the provisions therein contained as far as the same extend, and in

so far as the same do not extend shall as well with re- CH. XVIII.
spect to the persons who ought to be made parties to
special cases as in every other respect be governed and
regulated by the rules, orders, and practice of the court
instituted by bill, so far as the same can be applied
thereto, and subject to such general rules and orders as
aforesaid, the costs of all proceedings under the Act
shall be in the discretion of the court (sec. 32).

Every such special case is entitled as a cause between
some or one of the parties interested, or claiming to be
so, plaintiffs or plaintiff, and the others or other of them
as defendants or defendant (sec. 7). It shall also state
such facts and documents as may be necessary to enable
the court to decide the question thereby raised (sec. 8).

Whenever any material point is raised upon which the
evidence is doubtful, the case must state all the facts
upon the subject, as the court will not act upon infe-
rences drawn by the parties themselves.ⁱ

Every special case requires the signature of all parties,
and be filed in the same manner as bills are now filed.
No defendant shall be required to take an office copy
thereof, but an office copy shall be taken by the plaintiff.
The defendant appears to the special case in like manner
as he is required in respect to a bill (sec. 10). The same
counsel may sign for both plaintiff and defendant.^j
After the special case is filed, the same effects follow, and
the parties are subject to the jurisdiction of the court in
the same manner as in the case of bills, and they are
bound by the statements therein (sec. 11). The special
case thenceforth becomes to all intents and purposes a *lis
pendens*, and may be registered under the Act 2 Vict. c. 11.
But until so registered, it shall not be binding on a pur-
chaser or mortgagee without express notice (sec. 17).

ⁱ Domvill v. Lamb, 9 Hare, Append. 55.

^j *Ex parte* Craig, 15 Jur. 762; 20 Law Jour. 136.

CH. XVIII. — Previously to setting down the case for hearing it is necessary to obtain the certificate of the record and writs clerk that it is in a fit state to be set down. Subpœnas to hear judgment are issued and served in the same manner as in the case of ordinary suits (sec. 12).

When the case is set down for hearing it will come on in the same order in which it is set down in the cause book. It is then argued by counsel as upon the hearing of a cause.^k

Upon the hearing of a special case it shall be lawful for the court to determine the questions raised therein, or any of them, and by decree to declare its opinion thereon, and so far as the right involved therein, without proceeding to administer any relief consequent upon such declaration, which declaration shall have the same force and effect as it would have had, and be binding to the same extent as such declaration would have been if contained in a decree made in a suit between the same parties instituted by bill (sec. 14).

There is no jurisdiction upon a special case to make binding declarations upon future rights.^l Neither has the court any authority in respect to a decree for specific performance of a contract.^m

The court may, at any time after filing the special case and the defendant's appearance, order any document which may be admitted to be in the possession of any party to such case to be deposited and produced in such manner and for such purposes as the court shall think fit (sec. 18).

The 19th section enables executors or administrators of

^k *Jenkinson v. Harcourt*, 2 Week. Rep. 688; *Day v. Day*, 18 Jur 1013.

^l *Greenwood v. Sutherland*, 10 Hare, Append. 12; *Garlick v. Lawson*, *ibid.* 14; *Burt v. Sturt*, Week. Rep. 145.

^m *Evans v. Evans*, 22 Law Times, 43.

any deceased person, after the expiration of one year CH. XVIII.
from his death, to obtain an order of the court for the
purpose of ascertaining the debts and liabilities affecting
the personal estate of such deceased person, and upon
satisfaction thereof to indemnify the executor or adminis-
trator in administering the assets. But now, by a more
recent Act, 23 & 24 Vict. c. 38, s. 14, such order may be
made immediately or at any time after probate or admin-
istration shall have been granted either by the Court of
Chancery upon motion or petition of course, or by a
judge at chambers by summons, and thereupon the court
or judge on application of the executors or administra-
tors by motion or summons may restrain or suspend until
the account directed by such order shall have been taken,
any proceedings at law against such executors or admin-
istrators by any person having any claim or demand
upon the estate of the deceased by reason of any debt
or liability due from it upon such notice and terms and
conditions (if any) as to such court or judge may seem
just; and notices for creditors to come in published in
pursuance of such order will discharge the executor or
administrator under the 29th section of 22 & 23 Vict.
c. 35.

All orders and decrees made under the provisions of
the above Act, 13 & 14 Vict., shall be subject to re-hear-
ing, appeal, and review, and may be discharged and varied
in the same manner as decrees and orders in suits insti-
tuted by bill (sec. 33).

By Reg. 29th October, 1853, all appeal motions from
orders on the hearing of any special case are to be set
down with the appeals, and not with the appeal motion.
It must be set down with the registrar's clerk at the
order of course seat.ⁿ Where, after a special case had

ⁿ *Bythesea v. Bythesea*, 2 Week. Rep. 677 ; *Schroder v. Schroder*,
18 Jur. 987.

CH. XVIII. been set down, a party thereto died, liberty was given to amend by making his representatives parties.^o

The 44th section 15 & 16 Vict. c. 86, respecting the representation of a deceased party, is equally applicable to a special case as to a bill.^p

PROCESS TO ENFORCE DECREES AND ORDERS.

The manner in which the court compels obedience to its orders and decrees is regulated by the Consolidated Orders as follows :—

When any person is by any decree or order directed to pay any money, or deliver up or transfer any property, real or personal, to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such decree or order upon being duly served with the same, without demand, and process may issue accordingly to enforce performance thereof (30th Mar. 1859, Ord. 17 ; 29 Cons. Ord. r. 1).

Every person not being a party in any cause who obtains an order, or in whose favour it is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause. And every person not being a party in any cause against whom obedience to any order may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause (26th Aug. 1841, Ord. 15 ; 29 Cons. Ord. r. 2).

1. *Attachment—Serjeant-at-Arms—and Sequestration.*

When any person is by a decree or order made in any suit or matter directed to pay money or to do any other act in a limited time, and after due service of the decree

^o Ainsworth v. Alman, 14 Beav. 597.

^p Swallow v. Binns, 9 Hare, Append. 47.

or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such decree or order shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient person. And in case such person shall be taken or detained in custody under any such writ of attachment without obeying the decree or order, then the person presenting the decree or order shall, upon the sheriff's return that the disobedient person has been so taken or detained, be entitled to a sequestration against his estate and effects. And in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the person prosecuting such decree or order shall be entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he was formerly entitled to upon a return *non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of a decree or order (Ord. 18th July, 1857, amending order 11th Ord. of 11th April, 1842; 29 Cons. Ord. r. 3).

When a person is committed or brought up by the serjeant-at-arms for breach of a decree or order, he shall not be released until he has performed the decree or order in all things that are to be immediately performed, and given such security as the court shall direct to perform the other parts of the decree or order (if any) at the future days and times thereby appointed (22nd May, 1661; Sanders, 308; 29 Cons. Ord. r. 4).

When a commission of sequestration is awarded, it is binding from that time, and not merely from the day on which it is executed;^a and the party on whose behalf the sequestration issues is entitled thereto, although the body

Commission of sequestration, from what time binding.

^a 1 Vern. 58.

CH. XVIII. is in custody under an attachment at the same time: but no sequestration lies till the time for the return of the attachment is out on which the body was taken;^r whereas, according to the practice of the common law, a plaintiff cannot have an execution against the goods of the defendant, under the writ *feri facias*, after he has issued his *capias satisfaciendum* against the body of the defendant.

Priority of
sequestra-
tion.

In Coulson and Gardiner,^s it was determined that a sequestration prevails against a prior conveyance designed to defeat it, but not against prior conveyances made *bonâ fide*, or for a valuable consideration; and in the same case it was held that sequestrations may be of copyholds as well as of other lands.^t

Third parties
protected by
examination
pro interesse
suo.

To prevent a fraudulent collusion between the party against whom the sequestration issues and another person setting up a fictitious claim, the court will allow the sequestrator to seize all property of a tangible nature, which *primâ facie* belongs to the party in contempt; and if the rights of third persons are involved in such property, they will be allowed to come in and prefer their claims, and be examined *pro interesse suo* in the lands or goods sequestered, or they may apply for leave to bring an ejectment to recover their lands.

2. Writ of Assistance.

Writ of
assistance.

If the defendant refuse to give up possession of an estate after a decree directing him so to do, the plaintiff may obtain an order of course for a *writ of assistance* to compel him; and, under 1 Will. IV. c. 36, s. 19, where

^r Martin v. Kerridge, 3 P. Wms. 240; Const. v. Barr, 2 Russ. 161.

^s 3 Swans. Rep. 279 n. (a).

^t See also Marquis of Caermarthen v. Hawson, *ibid.* 294.

any party obstinately retains possession of lands, or other real property, after a writ of execution of a decree, or an order for delivery of possession has been duly served, and demand of possession made, and upon an affidavit of such service of the writ of execution, and of such demand made thereunder, and a refusal to comply therewith on the part of the person against whom the writ is issued, the party issuing it shall be at liberty to obtain the usual order of course for the *writ of assistance* to issue, and that the intermediate writs of attachment and injunction, further commanding the party to deliver possession, or any other writ, shall be unnecessary (26th Aug. 1841, Ord. 13; 29 Cons. Ord. r. 5).

In case a person refusing to comply with the decree or order of the court be entitled to the privilege of parliament, such person cannot be attached or committed for disobedience or contempt, but must be proceeded against by an order for a sequestration *nisi*, which, on no cause being shown within the time limited by the order, is made absolute.

Under the 1 & 2 Vict. chap. 110, s. 18, all decrees and orders of a court of equity by which any sum of *money* or *costs* shall be payable to any person shall have the effect of a judgment at law. These writs of *fieri facias* and *elegit* being common law writs of execution after judgment respectively, requiring the sheriff to levy the debt out of the debtor's personal or real estate, their operation is restrained to legal interests, and not to estates held in trust, and when these writs are issued in aid of a creditor in equity, they are denominated an equitable *fieri facias* or *elegit* according as it is sought against the personal or real estate.

3. *Fieri facias—Elegit—and Venditioni Exponas.*

Every person to whom in any cause or matter pending

CH. XVIII. in the Court of Chancery any sum of money or any costs shall have been directed to be paid shall, after the lapse of one month from the time when the decree or order for payment was duly passed and entered, be entitled to sue out one or more writ or writs of *fiery facias*, or writ or writs of *elegit* (10th May, 1839, Ord. 1 ; 29 Cons. Ord. r. 6).

Upon every such decree or order hereafter to be entered, one of the entering clerks shall, at the request of the party leaving it, mark the day of the month and year on which the same is so left for entry ; and no writ of *fiery facias* or *elegit* shall be sued out upon any such decree or order unless the date of such entry is marked thereon (10th May, 1839, Ord. 2 ; 29 Cons. Ord. r. 7). Such writs when sealed are to be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he ought to execute such like writs. And these writs upon their return must be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the clerks of records and writs. And for the execution of such writs, the sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law (10th May, 1839, Ord. 3 ; 29 Cons. Ord. r. 8).

When it appears upon the return of any such writ of *fiery facias* that the sheriff or other officer has by virtue of such writ seized but not sold any goods of the person directed to pay such sum of money or costs as before mentioned, the person to whom such sum of money or costs is payable shall, immediately after such writ with

such return shall have been filed as of record, be at liberty CH. XVIII.
 to sue out a writ of *venditioni exponas* (10th May, 1839 ;
 Ord. 4, 29 Cons. Ord. r. 9). On every such writ of *fieri*
facias and *elegit* there must be indorsed in addition to the
 particulars required by the 3 Cons. Ord. rr. 2 and 5
 (which relate respectively to the indorsement by the so-
 licitor or by the party himself whenever he appears in
 person), the words "By the court," and also thereunder
 the calling and place of residence of the person against
 whom such writ shall be issued ; and every such writ
 shall be also indorsed for the sum to be levied, according
 to the form used upon like writs issuing out of the supe-
 rior courts of common law (10th May, 1845, Ord. 5 ;
 29 Cons. Ord. r. 10).

4. *Fieri facias de Bonis Ecclesiasticis and Sequestrari*
facias de Bonis Ecclesiasticis.

When it appears upon the return of any writ of *fi. fa.*,
 or any writ of *elegit* issued in pursuance of the 6th rule,
ante, that the person against whom such writ was so
 issued is a beneficed clerk, and has no goods or chattels,
 nor any lay fee in the bailiwick of the sheriff to whom
 such writ was directed, the person to whom the sum of
 money or costs mentioned in such writ is or are payable,
 shall, immediately after such writ with the return shall
 have been filed as of record, be at liberty to sue out one
 or more writs of *fi. fa. de bon. eccles.* or one or more writs
 of *sequestr. fa.* (18th July, 1857, Ord. 2 ; 29 Cons. Ord.
 r. 11). On every such writ so to be issued as before
 mentioned, an indorsement shall be made in addition to
 the particulars required by the above rules 2 and 5 of the
 3 Cons. Ord. the words "By the court," and also there-
 under the calling, if any, and place of residence, if any,
 of the person against whom such writ shall be issued ;
 and every such writ shall also be indorsed for the sum to

CH. XVIII. be taken or levied, according to the form used upon like writs issuing out of the superior courts of common law (18th July, 1857, Ord. 3; 29 Cons. Ord. r. 12). The writ when sealed shall be delivered to the bishop, and shall be executed by him as nearly as may be in the same manner in which he ought to execute such like writs issuing out of the superior courts of common law. And such writs when returned by the bishops shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the clerks of records and writs. And for the execution of such writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law (18th July, 1857, Ord. 4; 29 Cons. Ord. r. 13).

Of Process Generally.

Every suitor who prosecutes a contempt shall use his best endeavour to procure each process to be duly served and executed upon the party prosecuted; otherwise he shall pay costs to the party aggrieved, and lose the benefit of the process returned (22nd May, 1661; Sand. 306; 30 Cons. Ord. r. 1). After any order for a serjeant-at-arms shall be granted by the court, the registrar shall on request draw up the said order and deliver the same to the serjeant-at-arms or his deputy, who shall thereupon endeavour to apprehend the party prosecuted and bring him into court, to answer his contempt if he can. But if he cannot, no such order for a serjeant-at-arms shall be discharged, nor the contempt thereupon, without a certificate under the hand of the serjeant-at-arms that his fees have been paid. And after the order shall have so been drawn up and passed, no private or other agreement

shall be made between the party prosecuting the contempt and the person standing in contempt, or on their behalf for a compromise of the suit or the discharge of the contempt, unless such satisfaction shall be made, and a certificate thereof shall be produced to the court (4th Nov. 1674; 13th July, 1685; 12th June, 1694; 30 Cons. Ord. r. 2). CH. XVIII.

When a party is brought up to the court by virtue of any writ of *habeas* duly issued from the office of the clerk of records and writs, and by reason of the pressure of other business, or from any other course, the hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of *habeas* may be issued for such future day, if the court shall so direct, without payment of any fee (31st Jan. 1846; 30 Cons. Ord. r. 3).

Before the 10th order, 26th Aug. 1841, and 10th order, 11th April, 1842, the manner in which the court compelled obedience to its orders and decrees was by issuing a writ of execution of the decree, then to serve a copy on the party personally, and upon affidavit of service and of default, an attachment issued. This was followed, if deemed expedient, by a writ of proclamation, commission of rebellion, serjeant-at-arms, and sequestration. By the above orders however, confirmed by the 30 Cons. Ord. r. 4, it is directed that no writ of execution shall be issued for the purpose of requiring or compelling obedience to any decree or order, but the person required by any such decree or order, to do any act, shall, upon being duly served with such decree or order, be bound to do such act in obedience thereto. And by the 6th order of the 26th Aug. 1841, no writ of attachment with proclamations, nor any writ of rebellion, shall be issued for the purpose of compelling obedience to any process, order, or decree of the court (30 Cons. Ord. r. 5).

CH. XVIII.

To compel
performance
of a decree
by a corpo-
ration.

In compelling the performance of a decree by a corporation, it is usual to issue a *distringas*, an *alias distringas*, and an *alias pluries distringas*, previous to the writ of sequestration, although in some cases this formality has been dispensed with; and instead of going through the whole line of process, a sequestration *nisi* has been ordered at the return of the first *distringas*.^u

Separate
property of
a married
woman.

According to the strict rules of the common law, a married woman could have no separate interest in property independent of her husband, the queen-consort only excepted; but courts of equity, after trusts became pretty well established, have found means to relax the strictness of the common law, by giving a married woman, through the intervention of a trustee, a power of charging or disposing of property limited to her sole and separate use, without the concurrence of her husband.

An equitable consequence of this power is the right which the court claims to enforce its decrees against a married woman, by awarding execution against her property, as well personal as the rents and profits of her real estate; but herein the court goes no further; it acts only *in rem*, but not *in personam*, and therefore cannot attach her body, but will leave it where it was placed by the common law, viz., in the power of her husband.

^u *Lowton v. Marquis of Colchester*, 3 Mer. 546.

CHAPTER XIX.

SUING AND DEFENDING IN FORMA PAUPERIS.—COSTS.

A PERSON swearing that he is not worth five pounds after all his debts are paid, his wearing apparel, and that which forms the subject of the suit (provided it be not in his possession) only excepted, will be allowed to prosecute or defend his right without incurring the same degree of costs which all other suitors are liable to; and for this purpose the person, whether plaintiff or defendant, upon a petition being presented to the master of the rolls, accompanied with an affidavit together with counsel's certificate that he has a just cause of suit, may obtain an order to sue *in formâ pauperis*, and the court will thereupon allow him counsel and a solicitor. But, with respect to the certificate of counsel, we must observe that, although it be required in the case of a plaintiff, it is considered unnecessary on behalf of a defendant pauper.

After a person is admitted to sue as a pauper, no fee or reward must be taken of such party by any counsel or solicitor, nor any contract or agreement be made for any recompense or reward afterwards, under pain of the displeasure of the court: neither may they refuse their assistance to the pauper, unless they can satisfy the court that they have good reason for their forbearance: but

Qualification
to sue *in*
formâ
pauperis.

No fee or
reward to be
taken by
counsel or
solicitor to
pauper.

CHAP. XIX. this privilege does not exempt him from paying for the labour of writing.^a

Affidavit of
suitor's
poverty
must be
made by
himself
personally.

The affidavit of the suitor's poverty must be made by himself, and not a third person;^b and the affidavit of a defendant that he is not worth more than five pounds, except the matter in question, will not entitle him to defend *in formâ pauperis* when he appears to be in possession of land which forms the subject of litigation.^c

A person
not to sue as
a pauper in
autre droit.

A person suing as a pauper can only do so in his own right, because the indulgence intended to poor persons, not of ability to sue for their rights, by admitting them to prosecute their suits as paupers, extends only to persons suing in their own rights and not in *autre droit*, as an executor or administrator;^d but a guardian appointed under statute 1 Will. IV. c. 36, r. 9, to a person confined for contempt, being an idiot, lunatic, or *non compos mentis*, may, under the discretion of the court, defend *in formâ pauperis*.

A distinction has generally prevailed in a court of equity as to the circumstances and responsibility of the next friend of a married woman and that of an infant: in the former case because a married woman, being an adult, may choose whom she will to act for her in that capacity; whereas an infant, who has no such power, would be wholly unprotected if it were stringently held that his *prochein ami* must of necessity be a man of substance. The next friend of a *feme covert* must therefore be in such circumstances as to be able to give security for costs, whilst a pauper may sue on behalf of an infant.^e

^a Beam. Ord. Ch. 215 and 216. 3 Cons. Ord. r. 10.

^b 1 Dick. 136; *Wilkinson v. Belcher*, 2 Bro. C. C. 272.

^c *Spencer v. Bryant*, 11 Ves. 49.

^d *Paradice v. Shepherd*, 1 Dick. 136.

^e *Hind v. Whitmore*, 27 Law Times, 55. See also S. Smith's Eq. Pr. 177 and 779, 6th edit.

Where however an infant of the age of twenty years CHAP. XIX. made an affidavit that he was not worth £5, and applied to be allowed to sue *in formâ pauperis* by his next friend, who was also a pauper, but it did not appear by the affidavit that he could not procure a suitable person to act as his next friend, an *ex parte* order allowing him to sue by his next friend *in formâ pauperis* was discharged with costs; although it would have been otherwise if the affidavit had stated that he could not get any one but a pauper to act as his next friend.^f

If a pauper file an improper bill he may be committed; and the court will order him to be dispaupered where his conduct has been gross and vexatious.^g And we have in-
Punishment of pauper in instituting a vexatious suit.
 stances upon record where a pauper plaintiff has been ordered to be whipped for filing an improper bill;^h and if, after having commenced the suit as a pauper, he becomes of ability to sue, the court will order him to be dispaupered; so also, if it appear that he is in the possession of such property that he ought not to sue *in formâ pauperis*, as where he is in possession and receives the rents of the lands in question,—although the defendant may be entitled to take possession under a verdict at law. But a charity fund raised for the purpose of enabling a pauper to conduct his suit, is not a ground for dispaupering him.ⁱ

A party suing or defending *in formâ pauperis* will only be allowed what are termed *pauper* costs, viz. so much as he is proved, upon oath, to have been out of pocket;^j but there are some cases where they will be taxed as *dives costs*, i. e. as the costs of a party not suing *in formâ pauperis*.
Plaintiff or defendant pauper only allowed pauper costs.

Lord Eldon, in the case of *Rattray v. George*,^k in giv- No fixed rule

^f *Lindsey v. Tyrrell*, 30 Law Times, 238.

^g *Pearson v. Belcher*, 4 Ves. 629; *Wagner v. Mears*, 3 Sim. 127.

^h *Spence*, Eq. Juris. 690 n. (g); *supra*, 391 n.

ⁱ 16 Ves. 407.

^j 2 Eq. Ca. Ab. 633.

^k 16 Ves. 232.

CHAP. XIX.
as to *dives*
and *pauper*
costs.

ing his opinion upon the matters of pauper and *dives* costs, considers that there was no fixed rule upon the subject, but that it was discretionary in the court, according to the merits of the case. Thus, where the defendant put in an answer to a pauper's bill, which answer was reported impertinent, he decided that the costs of expunging the impertinence should be taxed as *dives* costs, and, when taxed, to be paid into court; so when a plea and demurrer was put in to a pauper plaintiff's bill, which was overruled, the court ordered the costs to be taxed against the defendant as *dives* costs, upon the principle that the counsel and solicitor do not give their labour to the adverse party, but to the pauper.¹

Although the Court of Chancery exercises its discretion in awarding costs, yet there are certain rules and principles by which its decisions are governed in respect of them.

Stat. 17 Ric.
II. c. 6, as to
costs.

The jurisdiction of the court in giving costs appears to be derived from the 17th stat. Ric. II. c. 6; and, in the exercise of its power to decree costs, it has respect not only to the different kind of suits, but also to the claims of certain individuals who may happen to fill responsible and gratuitous characters.

Principles
upon which
costs are
awarded,
and their
necessary
conse-
quence.

As a certain amount of expenses must necessarily be the result in all kinds of litigation, the main object of the court is the proper adjustment of such expenses, as to make them fall on the party who appears in justice and morality bound to discharge them. And thus the court of equity is said to have adopted two general principles in giving or withholding costs,—the *remuneration* of the successful party, and the *punishment* of the party who fails in the suit; although these terms must not always be understood in their strict and ordinary sense: for, notwithstanding the principle of punishment may in

¹ 1 Eq. Ca. Ab. 125.

some instances appear to be the main object, and that of CHAP. XIX.
 the remuneration in others, they are in most cases but relative terms, the one involving in itself the consequences of the other. For example, a mortgagee files his bill of foreclosure: now, although in ordinary cases he is allowed his costs, yet if he misconduct himself in the progress of the suit, or, being a defendant, sets up a groundless defence, he is deprived of them; in the former instance repayment is the chief object, in the latter punishment, without regard to the defendant, the mortgagor—although he (without its being the main object of the court) would be affected in respect to costs, as a necessary consequence of the conduct or misconduct of the mortgagee; in other words, he would necessarily be benefited in a pecuniary sense equal to the amount of such costs.^m Again, the general rule respecting trustees is, that they, conducting themselves fairly, shall be entitled to their costs; yet, where a trustee has been guilty of fraud or vexatious conduct, or otherwise misbehaves himself, he shall pay costs;ⁿ on the one hand the remunerative principle comes into operation, on the other the punitive principle, both in the strictest sense of the word. In another case, where a trustee had sold out stock and purchased land with the produce, even though the court went so far as to observe that the breach of trust did not discredit him, as he thought he might lay it out upon land, yet it directed him to replace the stock in such a manner as not to gain by the transaction, and to pay costs.^o *

^m Beames on Cos. Intr.; *Moore v. Painter*, Rolls Court, July 5, 1842.

ⁿ *Henley v. Phillips*, 2 Atk. 48; *Lowson v. Copeland*, 2 Bro. C. C. 156; *Buxton v. Buxton*, 1 My. and Cr. 40; *Thorby v. Yeats*, V. C. K. Bruce's Court, March 19, 1842; *Re Wyll's Trusts*, 8 Week. Rep. 645; 6 Jur. N. S. 906.

^o *Earl Powlett v. Herbert*, 1 Ves. jun. 297.

* *Vide* the Trustee Relief Act, 10 & 11 Vict. c. 96, *ante*, p. 242.

CHAP. XIX.

It will therefore be seen from these two examples, that, although the court may order costs to be paid by a party, yet it does not always follow that they are paid upon the strict punitory principle; for the trustee in the latter instance could not be fixed with the imputation of a moral wrong.

Where costs cannot be regarded either in the light of remuneration or punishment.

Also, when the principle of remuneration or punishment would no longer, with any semblance of justice or reason, be applicable, equity will refrain from adopting it, and will not allow one party costs to the prejudice of another; but, to speak more technically, each party would be ordered to pay his own costs. As in a suit for partition, which is generally considered to be for the benefit of all parties,^p no costs are given until the commission; and then the costs of issuing, executing, and confirming the commission are borne by the parties in proportion to the value of their interests, and no costs are allowed of the subsequent proceedings.^q So also, when a purchaser in a suit for specific performance of the contract has raised such an objection to the title as to form the subject of a reasonable doubt, even in the mind of the court, which made it a fair contest down to the hearing, in this case, although the objection be overruled, yet it will be without costs.^r

Costs as between party and party, or solicitor and client.

When costs are awarded by the court, they are either as between *party and party*, or as between *solicitor and client*, the costs in the latter case being given in greater proportion than those in the former.

When "costs," simply speaking, are directed to be paid, it signifies costs as between party and party, except in a foreclosure or redemption-suit, when the mortgagee is entitled to costs equally liberal with those denominated "costs as between solicitor and client."

^p See arguo. in *Metcalf v. Beckwith*, 2 P. Wms. 377.

^q *Agar v. Fairfax*, 17 Ves. 533 and seq.

^r *Cox v. Chamberlain*, 4 Ves. 631; *Aislabie v. Rice*, 3 Madd. 260.

Costs as between party and party may be defined as CHAP. XIX. those which one litigant party is usually ordered to pay to another; those between solicitor and client are such as each litigant party would, on taxation, be bound to pay to his own solicitor.

Costs as between party and party are generally given where the rights of all parties are adverse. Costs as between solicitor and client are ordered in cases where the respective parties are interested in one common fund, in proportions to be determined by the court, or to trustees or executors in suits for the administration of estates. And in suits for administration, trustees, executors, and administrators are not only entitled to their costs as between solicitor and client, but also to their costs, charges, and expenses properly incurred. In contested cases not relating to the administration of estates, the costs are usually taxed as between party and party, and even the mortgagee's costs of the suit are taxed as between party and party.

In a creditor's suit the question whether the costs are taxed between party and party or solicitor and client, depends upon the sufficiency of the fund to pay the debts. If the fund be insufficient, they are taxed as between solicitor and client, on the principle that all the fund then belongs to the creditors. On the other hand, if the fund be more than sufficient, they are in such case taxed as between party and party, as the costs in that case come out of the fund on an adverse party.^s

In *Brodie v. Bolton*,^t wherein a creditor's suit or fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale, M.R., considering it a hard-

^s *Hood v. Wilson*, 2 R. and M. 687; *Brodie v. Bolton*, 3 M. and K. 168.

^t 3 M. and K. 168.

CHAP. XIX. ship that creditors, not parties to the suit, should come in and reap the benefit of it without contributing to the plaintiff's extra costs, made an order by which it was directed that the plaintiff's costs as between party and party were to be paid out of the fund, and that his extra costs should be paid *pro rata* by all the creditors who partook of the benefit of the suit.^u

Costs generally paid by the unsuccessful party.

Although the Court of Chancery, under and by virtue of the statute 17 Ric. II., before noticed, is empowered to award costs according to its own discretion, yet they must in general be paid by the unsuccessful party, unless he can show the existence of circumstances sufficient to induce the court to withhold them;^v and in the exercise of its discretion it will also, according to the justice of the case, either apportion the costs between the several parties, or throw them upon particular estates or funds.^w

Legatee not allowed his costs unless the ambiguity of the will has rendered the suit necessary.

Where a bill is filed by a legatee for the payment of his legacy, he will not be allowed his costs out of the testator's estate, notwithstanding there is ambiguity in the will; but if the ambiguity rendered it necessary to file a bill in respect of the legacy, the costs will be directed to be paid out of the assets of the testator; as where a bill was brought to secure and have the benefit of a contingent interest devised over.^x The costs of instituting an inquiry respecting a specific legacy will be ordered to be paid out of the testator's estate, and the reason assigned is, that it would otherwise abridge the specific legacy.^y

In a suit for an account, the unsuccessful party will in general be decreed to pay costs; unless the accounts be

^u Stanton v. Hatfield, 1 K. 358. See Gaunt v. Taylor, 2 Hare, 420; Dan. Ch. Pr. 1315-6.

^v Vancouver v. Bliss, 11 Ves. 458.

^w Besevi v. Serra, 14 Ves. 313.

^x Studholme v. Hodgson, 3 P. Wms. 303.

^y Nesbitt v. Murray, 5 Ves. 149.

intricate and doubtful, and the party had a reasonable ground for requiring an investigation, in which case there will be no costs on either side.^z CHAP. XIX.

The court having directed an issue, the party in whose favour it is found is generally allowed the costs of trying it. But it is otherwise in the case of an heir-at-law, who, where a bill is filed against him to have the trusts of the will carried into execution, and an issue to try the validity of the will, is allowed his costs, although the issue be found for the devisee. If however the heir does not depend solely upon his common law rights, but sets up the insanity of the testator, and fails, he shall not have his costs, although they will not be given against him. The court of which the heir-at-law is a favourite thus interferes on his behalf, by reason of the frail and imperfect mode of examining into facts, and considers that the heir has a right *ex debito justitiæ*, upon being brought into a court of chancery in order that a will may be established against him, to demand an issue to see whether he be disinherited or not.^a But the court in such cases will exercise a discretion; therefore it has been held that an heir-at-law defending *in formâ pauperis*, in a suit to establish a will, was under the circumstances entitled only to pauper costs.^b

Neither an infant nor *feme covert*, who sue by their next friend, are liable to costs; but the next friend who improperly institutes the suit on their behalf is liable to pay the costs. Where, however, a suit has been commenced on behalf of an infant, and he proceeds with the suit after he has arrived at the age of twenty-one years,

Where an issue has been directed, the successful party generally allowed his costs.

Neither an infant nor feme covert are liable to costs, but their next friend.

^z Pitt v. Page, 1 P. C. Ca. 126; 6 Vin. Ab. 332, 365; 2 Eq. Ca. Ab. 237, S. C.; Willis v. Block, 4 Russ. 170.

White v. Wilson, 13 Ves. 91.

^b Stafford v. Higginbotham, 2 Keen, 147.

CHAP. XIX. he makes himself liable for the whole costs.^c Costs at law cannot be set off against costs in this court.^d

As to costs
of a trustee.

In the case of a trustee and next friend, against whom no improper conduct can be alleged—although usually they are allowed their costs as between party and party, yet the court will go further—when a trustee, in the fair execution of his trust, has expended money, by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust; in such and the like cases, he is not only entitled to his costs, but also to his charges and expenses, under the head of just allowances. And, in the case of an infant, as he himself cannot incur charges and expenses, Lord Eldon thought that the next friend ought to be allowed them under just allowances; for persons would deliberate a considerable time before they accepted that office, were the next friend to be at the whole expense of the infant beyond his costs.^e

The same doctrine was also recognized in an earlier case;^f for, although upon an application to the court that certain expenses should be repaid, under the head of just allowances, Lord Thurlow, looking at the circumstances, said he could not make the order for fear of the precedent, yet, as the mother of the infant would have been allowed her costs under the head of just allowances, if she had been an accounting party (for example, a receiver), and had paid an agent whom she employed to collect the rents, he would put it in the same shape, and allow the payment of the expenses incurred as *a payment made by the mother*. And, in another case,^g when the master had reported the bill to have been a proper one,

^c 1 Str. 708.

^d *Sainter v. Ferguson*, 14 Law Times, 217.

^e *Fearn v. Young*, 10 Ves. 184.

^f *Stewart v. Hoare*, 2 Bro. C. C. 263.

^g *Taner v. Iver*, 2 Ves. sen. 465.

the *prochein ami* of an infant was allowed his costs, notwithstanding the bill was in its result dismissed with costs, there having been no laches or misbehaviour in carrying on the suit. CHAP. XIX.

Although a relator be made a necessary party to an information and bill, respecting a charity fund, in order that there may be some one to answer the costs in case the information be improperly filed, yet, generally, if persons in this office conduct themselves properly, or have been the means of benefitting the charity, they will be allowed their costs.^h And, where a question arose respecting the residue bequeathed by will to charitable purposes, the costs of all parties, the next of kin, the executor, and the attorney-general, were directed to be paid out of the fund, as between solicitor and client.ⁱ In cases of charitable bequests also, the heir-at-law, "not having made an improper point," has been permitted to have his costs as between solicitor and client.^j Costs of a relator.

The court of equity, in exempting from costs guardians, trustees, and executors, as well as others who voluntarily take upon themselves the onerous responsibilities attached to their fiduciary character, when in ordinary circumstances they would have to pay the costs, or in directing their costs to be paid out of the estate in their hands, when in any other capacity they would not be entitled to costs, have proceeded purely upon the principle of remuneration; since, if the court did not interfere to compel persons not in a position to assert their own rights, and who are incapable of instituting proceedings for themselves, to discharge a duty towards others who have voluntarily undertaken their cause, and which in conscience Reasons why costs are not usually claimed against trustees, etc.

^h Attorney-General v. The Brewers' Company, 1 P. Wms. 376; Osborne v. Binne, 7 Ves. 424.

ⁱ Moggridge v. Thackwell, 7 Ves. 36.

^j Curie v. Pie, 17 Ves. 462.

CHAP. XIX. — they are bound to perform in return for such gratuitous interference, few persons would be found willing to yield any assistance to others in a cause, however worthy, which, in the result, might expose them to a certain loss, without the least chance of any benefit resulting to themselves.

Costs of suit generally ascertained by taxing master.

Although, in some instances, the amount of costs is ascertained and awarded according to the established and fixed practice of the court, yet the costs of a suit are generally ascertained by the taxing master; and when his certificate of the amount of costs is filed they are recoverable by a subpoena and attachment, as formerly and now by a *fi. fa.*, and *elegit*, under the 1 & 2 Vict. c. 110.

Where a party decreed to pay costs dies before taxation.

If a party, who by a decree is directed personally to pay the costs, dies *before taxation*, and there remains nothing else to be done under such decree, the obligation to pay the costs dies with him, since the court will not allow a suit to be revived for the sake of costs alone, unless they are to be paid out of an estate,^k although they have been actually awarded before the suit became abated; nor can such costs be taxed pending the abatement: they are, therefore, lost to the party to whom they have been awarded,—which rule is generally admitted to be much complained of.¹ But, if the costs were actually taxed before the party's death, which would thus render them in the nature of liquidated damages, or there remained, in addition to the payment of costs, anything further to be executed in the decree, which would in itself require a bill of revivor to complete it; in such case, notwithstanding the party dies before taxation, the suit may be revived for costs: which Lord Hardwicke, in the case of *Kemp v. Mackrell*,^m said, he always held to be a hard rule, and

^k 1 Dick. 16; *Jenour v. Jenour*, 10 Ves. 572.

¹ *Lee v. Lee*, 1 Hare, 617; *Law Jour.* N. S. 26.

^m 2 Atk. 114.

a very nice distinction, since the right to costs is the same before taxation as after, only the *quantum* has not been ascertained.ⁿ *

If a client wishes to have his solicitor's bill taxed, and to compel him to give up deeds, papers, memoranda, etc., which he, as solicitor, holds in his custody, he may obtain an order for that purpose, by petition or motion, giving in the meantime an undertaking to pay what shall ap- TAXATION OF
SOLICITOR'S
BILL.

ⁿ See the recent decision upon this subject, in *Andrews v. Lockwood*, 16 Jur. 278 ; 7 Law Times ; and the same case upon appeal, 10 Law Times, 301 ; but see also *Robertson v. Southgate*, 18 Law Journ. 404.

* Viewing this rule, indeed, at first sight, in connection with its practical results, it is difficult to imagine how it can proceed from that equity which "delighteth in equality." In most cases it operates so severely as to prove the cause of regret to the court itself, and induces the judges, whenever an opportunity occurs, to exert their ingenuity in finding out exceptions, for the sake of mitigating its hardship. This part of the doctrine relating to costs is however based upon the technical principle which directs them to be paid as a punishment by the unsuccessful party : therefore, as it is a personal demand, the action dies with him. This frequently occurs where a sole plaintiff, against whom there is a decree with costs, or where the bill is dismissed against him for want of prosecution, dies before taxation. The suit may have been most wantonly commenced, and vexatiously conducted ; in the course of which the defendant may have been put to very grievous expenses : for, having been duly served with a printed copy of the plaintiff's bill, he must either meet it by appearance and answer, or incur the costs and inconvenience of committing what is called a contempt of court. The result of the suit, however, shows that the plaintiff had no equity, and he is therefore ordered to pay all the costs of his unjust proceeding. But a day or two before taxation the plaintiff dies, and thus all the expenses which the defendant has incurred by being brought before the court, and protecting himself, are thrown upon him. Upon strictly technical reasons alone is such a state of things allowed ; and the property of the plaintiff, which would have been bound to make good the defendant's losses after taxation, is now exempt, by reason of the plaintiff's death before that event. This principle, which considers costs

CHAP. XIX. — pear due from him upon taxation. But when they come into the solicitor's hands in any other manner than in the way of business, that party must have recourse to his action.^o But should the client, having obtained the above order, afterwards die, his representative, for the purpose of receiving the same, must give the like undertaking to pay.

Conclusion. We have thus taken a general survey of the proceedings in a court of chancery, from the commencement to the termination of a suit, during the progress of which

as a personal demand, and ought not therefore to survive against the representative, is a mere figment, and seems to have overlooked the case of an innocent party, *i. e.* the defendant, who is thus punished, and his property diminished, by having to pay the expenses incurred through the really guilty person. The costs, whether taxed or not, are, in reality, nothing more than a debt due from the party by whom they are incurred. If, in addition to costs, a corporal punishment were awarded against him, there would be some justice in allowing the demand, so far as the latter part of the sentence extended, to die with the person; for no one would expect a man's personal representatives to suffer corporal punishment in the place and stead of the deceased offender. But, where costs have been incurred solely through one party, and the question arises whose estate shall pay those costs, it seems as unreasonable to make any distinction with respect to the liability before and after those costs are taxed, as to hold that two tradesmen, having had mutual dealings with each other, and one of them dying before the accounts are settled, the survivor of them shall not be entitled to the balance afterwards found due to him, because the accounts were not settled, and the balance not ascertained, during the lifetime of the other. It was, perhaps, upon the principle just mentioned, of regarding costs as a personal punishment, that, anciently, a pauper plaintiff who did not succeed in his suit, and who therefore could not satisfy the demands of justice out of his own pocket, was punished by whipping, or otherwise corporally.—Spence, 690 *n.* (g). *Vide ante*, 382.

^o *Lawson v. Dickinson*, 8 Mod. 306; *Strong v. How*, 8 Mod. 339. See *in re Murray*, 1 Russ. 519; also, *in re Rice*, 2 Keen, 181.

the student cannot but have observed, by reason of the CHAP. XIX.
narrow limits afforded for the consideration of the subject, that most of the chapters have been treated with a necessary brevity. But although we must acknowledge that many of the topics, if exclusively discussed, would in themselves furnish materials for several volumes, yet, it is presumed that, by an attentive perusal of these few pages submitted to the student's notice, he will be enabled so far to master the leading features of a suit in equity, as not to feel bewildered while engaged in the innumerable points of detail that are more or less incidental to every stage of the proceedings, but which are beyond the design and compass of these pages to anticipate, since many of them are only to be acquired by actual practice and long-tried experience.

There will, however, be seen, as well in this as in every other treatise on equity jurisprudence, sufficient to correct the erroneous idea too often entertained by the vulgar and uninitiated, in regard to the lax and uncertain principles that regulate the decisions of our judges in the Court of Chancery, as being left to the *forum conscientiae* of the person who happens at the time to be the presiding genius of the court,—a notion acquired, perhaps, by the intelligent and learned either from their own abstract speculations upon the subject,—a too exclusive consideration of the systems of Roman jurisprudence, or of every other country except their own,—and a notion generated among the vulgar, either from their proneness to lay hold by the wrong handle of whatever pertains to law and lawyers,—or, what is most probable, from no consideration at all. The reader, however, as he carefully traces the history of the rise and progress of our courts of chancery, from the time of the “Father of Equity,” Lord Nottingham, up to the present moment, and marks the analogy so frequently upheld between the equity and common

CHAP. XIX. law courts, will observe the jealousy with which our great lawyers have adhered, as much as possible, to the broad and well-trodden paths of the old common law; he will discover, moreover, that, in the administration of the equitable jurisdiction, the chancellor himself, so far from being left to decide according to what he may deem reasonable in reference to the circumstances of each particular case, is tied down to certain fixed principles contained in the decisions of his predecessors, and as seen in the voluminous reports which have been transmitted to us, in an unbroken series, from the days of Vernon to our own. The proceedings of the chancery courts, says Lord Hardwicke,^p have been formed according to the course of the civil law in some respects, and analogous to the common law in others. In Bishop Burnet's *Life of Sir Matthew Hale*, we are told that this eminent judge "did look upon equity as a part of the common law, and one of the grounds of it; and, therefore, as near as he could, he did always reduce it to certain rules and principles, that men might study it as a science, and not think the administration of it had anything arbitrary in it." So that the courts of chancery, which at first sight appear to be repugnant to our favourite notions of the common law, have, nevertheless, by the sound intelligence and the unwearied exertions of those clear master-minds that have successively occupied the woolsack, and rendered their names illustrious for talent and integrity, mutually co-operated to fix our equitable tribunal on such a basis as to meet the exigencies which are perpetually arising to a nation like our own, boasting of its civil rights, its unrivalled commerce, and its constitutional freedom.

^p *Davis v. Davis*, 2 Atk. 23.

APPENDIX.

APPENDIX A. (p. 130, *supra*.)

Injunction.

THE alteration made in the new practice in respect to injunctions has sometimes raised considerable doubt as to how far it was intended that the difference which formerly distinguished the common from the special injunction should cease to exist. That it was not intended by the framers of the Act to introduce a complete analogy between them is clear from the words of the 58th section, viz.: that the assimilation shall extend "only so far as the nature of the case will admit." This adroit method of dispensing with a difficulty, and leaving its solution to be worked out by the ingenuity of those whose province it is to administer its provisions, has not been without its anticipated effects. Accordingly several cases arose soon after the new Act came into operation, which, after various discussions, seem to have settled, at least for the present, the extent to which the injunction to restrain proceedings at law assimilated to the special injunction.

The first case which appears to have been decided on the subject is that of *Senior v. Pritchard*, 16 Bea. 473, wherein the master of the rolls, having consulted the other judges, said that it was not meant by the 58th section to deprive the plaintiff of his right to have an injunction analogous to the common injunction; but he is not to have it merely as of course, but only upon affidavit of merits, in the same manner as a special injunction. The intention was, not to abolish the common injunction, but to place it on a new footing. His honour, in the same case on a subsequent occasion, said, that "the Improvement of the Chancery Jurisdiction Act does not destroy the plaintiff's right to the benefit of

a discovery in aid of his defence at law, and that it does not assimilate the practice completely and entirely to that of special injunctions as the clause expresses. That is, the common injunction is not now to be obtained merely on the defendant's default as heretofore, but a *prima facie* case must be stated on the bill and be supported by affidavit. When therefore the defendant has not answered the bill, but has filed affidavits stating facts which, if there were nothing more in the case, would be sufficient to displace the plaintiff's equity, yet as it is quite possible that additional facts restoring that equity may be brought out by the answer to the interrogatories, the court will grant an injunction till answer."

Lovill v. Galloway, 17 Bea. 5, was a suit in which a bill was filed for discovery in aid to an action at law. The bill stated that it was filed *bonâ fide* and not to create delay, and prayed for discovery and an injunction to stay the proceedings at law until the answer could be put in. In support of the bill the plaintiff filed affidavits, in which the statements submitted to the company by the defendants were questioned. The defendants filed counter affidavits, and the motion for the injunction to stay the trial at law now came on; and the master of the rolls said that "all that was meant by the 58th section was, that the plaintiff should verify such statements as were within his knowledge, and state on oath that he believed the statements which rested upon the information of others, or on the inferences to be drawn from these facts. It was not intended to prevent him from making charges for the purpose of drawing from defendant a full discovery of all he knew about the facts so stated. The other object of the section was, that when the answer is put in the plaintiff is not then to be precluded by it; but if there are facts stated in the answer which the plaintiff knows to be untrue, he is at liberty to bring forward evidence to satisfy the court that the statements in the answer are not correct, and the court may then deal with it as it shall think fit."

The same case afterwards coming on upon a question of costs reserved (3 W. R. 156), the defendant having filed his answer, now moved to dissolve the injunction and the costs of the suit, the only question being as to the costs reserved. The plaintiff contended that an exception should be made of the costs of the motion for the injunction, on the ground that it was improperly opposed. His honour, on the present occasion, held that when

a plaintiff at law files a bill for discovery, he is entitled, on verifying by affidavit the case made by the bill, to an injunction until he obtain full discovery by answer, and that the defendant cannot say that the plaintiff has no case and refuse discovery; and that the clause of the Chancery Improvement Act which directs the practice on injunctions to stay proceedings at law to be assimilated to that with respect to special injunctions, applies to the case of an injunction upon a bill for *discovery only*. His honour, moreover, said that he had consulted the other branches of the court, and, concurring in his view that the opposition to the motion was improper, their unanimous opinion was, that he ought to have made the defendant pay the costs of that opposition. If the defendant had filed no affidavits, the costs of the motion would have been costs of the cause, and the defendant would have got them. This not having been done, the proper course then was to give no costs of the motion, and that the defendant should have the costs of the cause. That in future, if the motion for an injunction was in his opinion improperly opposed, the costs of opposing it must be paid by the defendant in case he does not succeed in his opposition, which, except in very special cases, as of fraud, he could not do until a full answer had been put in.

But in *Chilton v. Campbell*, 20 Bea. 531, the plaintiff having, before filing interrogatories, moved for an injunction to restrain proceedings at law, the defendant filed an affidavit displacing the grounds of defence at law. The injunction was refused, and the plaintiff not being now entitled as of course to an injunction, it would seem that the alteration goes to this, namely, that in substance what the court has to determine on motion to restrain proceedings at law is very much the same as what it had formerly to determine on showing cause against dissolving; that is, the court will determine whether, on the merits, looking at the whole, there is a fair question to be reserved to the hearing, and, if so, whether, in the meantime, an injunction shall be granted, and on what terms (*Magnay v. The Mines Royal Co.*, 3 Drew, 130; 24 Law Jour. Ch. 413; *Harris v. Collett*, 26 Bea. 222).

A plaintiff who files a bill for discovery in aid of his defence at law is entitled, as soon as he has filed his interrogatories, to move for an injunction to stay proceedings in the action without waiting for an answer; and even before the expiration of the eight days allowed the defendant under the old practice for putting in

his answer (*Lloyd v. Adams*, 4 K. and J. 467; *Senior v. Pritchard*, *supra*).

It was held, upon an application for substituted service of a bill for an injunction to restrain an action at law, when the plaintiff at law was out of the jurisdiction, that as under the new Act the motion must be upon notice, there was no necessity to call for an affidavit upon merits (*Serjison v. Beavan*, 16 Jur. 1111). But when the motion is made *ex parte*, it was held that the court will not dispense with an affidavit of merits though the plaintiff allege that he has no knowledge of the facts stated in the bill (*Mollett v. Enequist*, 4 Jur. 1009; 27 Law Jour. Ch. 815; Law Times, 279).

Although the injunction to stay proceedings at law and a trial may now be obtained without notice, the court will be very cautious how it exercises its discretion in so doing; for when, by reason of the delay on the plaintiff's part, an application was not made until the eve of trial, surprise shown, the order *ex parte* was discharged with costs (*Seton on Decrees*, p. 455. See also 9 Hare, App. 29; *Fisher v. Baldwin*, 1 W. R. 484; also *Zuluata v. Vincent*).

The jurisdiction which now belongs to the courts of common law under the Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125, ss. 50, 57, 83), to compel discovery upon oath of the litigant parties and to admit equitable defences, does not interfere with the power of a court of equity to restrain actions at law upon the grounds on which it formerly proceeded in such cases (*The British Empire Ship Co. v. Soames*, 26 Law Jour. Ch. 259; 3 K. and J. 433; *Magnay v. The Mines Royal Co.*, 24 Law Jour. *supra*; *Hodgson v. Druce*, 4 W. R. 576; *Gompertz v. Pooley*, 4 Drew, 448; S. C. 7 W. R. 275; *Kingsford v. Swinford*, *ib.* 215; *Terrell v. Higgs*, 1 De Gex and J. 388-390).

APPENDIX B. (p. 274, *supra*.)

15 & 16 Vict. c. 86, sec. 42.

Parties.

It will be seen, by perusing this section, that it was not intended by the legislature to exclude from the suit those persons who

were formerly considered as necessary parties to the record. It only prevents a defendant from defeating the plaintiff's suit by taking the objection of their not being made parties in the first instance. If they consist of that class of persons who formerly would have been interested parties against whom a decree was to be made, it is still necessary to bring them before the court, although by a proceeding after the decree. The right therefore which the court assumes in requiring the presence of all persons interested in the subject matter of the suit before a decree can be effectually carried out, is by no means extinct or diminished. The only difference is that parties interested need not appear upon the record in the first instance; but after decree they must be served with notice of the proceedings. Thus it will still be necessary, in ascertaining who those parties are, to understand whether they would have been necessary parties in the first instance under the former system.

The case of *Dood v. Higgins*, as reported in 9 Hare, App. 32, and 1 W. R. 30, is not without its importance in showing the great jealousy with which the court will, notwithstanding the new orders, guard against any laxity in its old principles in reference to the necessity of bringing before the court all persons materially interested in the subject matter of the suit; and that the legislature having provided an easy means of introducing parties before the court by serving them with notice of the decree, there is now less reason for dispensing with them than formerly, and when done at all, it must be under peculiar circumstances, and the excepted cases those of extreme difficulty. So that, where there is a sale of an estate under a decree of the court, the general rule is that all persons interested in the proceeds must (subject to the above exceptions), to secure a proper sale and protecting the title of purchasers from being open to impeachment, be parties to the suit, or be served with notice of the decree under the 8th rule of the 42nd sec. of the Act 15 & 16 Vict. c. 86.

In the above case the testator, after giving the income of his residuary real and personal estate to Jane A. for life, and after her decease to Elizabeth B. for life, directed his trustees to sell his estates and divide the proceeds among "the following persons or their heirs for ever, the grandchildren of the testator's uncle, John A., the grandchildren of his uncle, Richard W., and also the grandchildren of his uncle, Samuel W." It was held—

That the court being satisfied that neither the heirs-at-law nor the personal representatives of the deceased grandchildren had any reasonable ground of claim, it was not necessary to make them parties to the suit; but

That the other grandchildren and the next of kin of the deceased grandchildren of the testator must be brought before the court on the further prosecution of the suit, by being served with notice of the decree under the 8th rule of the 42nd section. It was determined—

That the 51st section of the above Act, which empowers the court to adjudicate between some of the parties, does not render the decree binding on the absent ones in the same manner that the 42nd section does upon service of notice of the decree.

In this case the vice-chancellor, Sir G. Turner, said that he had communicated with the other judges, who concurred in the opinion that all the next of kin of the deceased children must be made parties under the 42nd section of the new Act and the General Orders. They were all interested in the sale of the property. It was also important that the titles to estates sold by the court should not be impeached by purchasers. In suits by creditors on behalf of themselves and others, the law gives a power to the trustees to deal with the estate, but there was no such rule in the case of legatees. He had found no case wherein some legatees or *cestui que trusts* were allowed to sell without the others except *Batten v. Parfitt*, 2 Y. & C. Ex. 343; but the grounds of that case did not appear, and the circumstances were special.

Densem v. Elworthy, in the same vol., Hare, App. 43, is another case which bears upon the 42nd section. The bill which was filed for the execution of the trusts of a will directing a sale and distribution of the proceeds of real estate was framed, not in the manner authorized by the new Act, 15 & 16 Vict. c. 86, but according to the old practice of making the trustees and all the residuary legatees parties to the suit; but one of such legatees had married, and her interest under the will was settled upon the marriage for the benefit of the husband and wife, and children of the marriage. The trustees of the settlement were not parties to the suit, nor were the issue of the marriage; and it was held that the trustees of the marriage settlement ought to be made parties; but that the children of the marriage would be sufficiently represented by the trustees of the marriage settlement without bringing them before the court.

It would seem therefore in this case, that if the plaintiff had proceeded under the new Act, there would have been no necessity to make the residuary legatees parties in the first instance ; yet having done so with respect to some of them, according to the former practice, he was bound to make them all parties.

Under the 30 Ord. 26th Aug. 1841, in *Witton v. Jones*, 2 Y. & C. 244, K. Bruce, vice-chancellor, doubted whether that order applied to foreclosure suits respecting real estates, when the children interested under the will of the mortgagor had not been made parties ; his Honour observing that although executors would be sufficient parties to a suit for foreclosing chattel leaseholds, yet to a bill for foreclosing freeholds held in trust, the *cestui que trusts*, as well as the trustees, had up till that time been considered necessary parties (marginal note).

Goldsmid v. Stonehewer, 9 Hare, App. 38. It was held in this case that the representation of the *cestui que trust* of real estate by the trustees under Rule 9, 15 & 16 Vict. c. 86, s. 42, in suits against them for foreclosure or sale extends to the case of infants *cestui que trusts*, and to trustees of subordinate interests under settlements of shares of children in remainder ; but *not otherwise to cestui que trusts*. His Honour, the vice-chancellor, observing that “as infants and the trustees of the settlements which have been made of the shares of children in remainder, cannot reasonably be expected to be in a position to redeem the estate, *and not having the means of redeeming* the mortgage, I think it is not necessary they should be made parties.” He also said, there is this difference between the case of an executor and that of a trustee ; that the executor has the control of the whole estate of the testator, whilst the power of the trustee is limited to the particular fund which is the subject of the trust, and he has not necessarily the control of any other fund (Illustration of 1st Proposition, *infra*).

Hanman v. Riley (*ibid.*), App. 40. The object of the Act (per vice-chancellor) in enabling trustees of real estate to represent the persons beneficially interested in such property, was to save the expense of bringing before the court all the *cestui que trusts*, who generally, if necessary parties to the conveyance of the estate, were only so for the purpose of contracting with the purchaser. The trustees convey to the purchaser the legal estate, and the court deals with the purchase-money (Illustration of 3rd Proposition, *infra*).

Tudor v. Morris, 1 Sm. & G. 503. Under rule 9 the court has a discretion to treat trustees in whom the legal estate vests as representing the trust or not, upon a claim by a mortgagee seeking to foreclose against the trustees only of an estate in remainder, and the court required that the persons interested in the trust be made parties to the claim; but at the same time dispensed with their being made parties upon affidavit, to the effect that either they had notice of the proceedings, or that they did not object to the proposed decree (Illustration of 4th Proposition, *infra*).

Young v. Ward, 10 Hare, App. 59. The Vice-chancellor observed that the objection to make a decree of foreclosure in the absence of the persons beneficially interested in the estate, and where there was no other defendant than the infant heir-at-law of the mortgagor, was that which was adverted to by the lord justice Turner in *Goldsmid v. Stonehewer*; that there was no one before the court who could by possibility be in possession of funds applicable to the redemption of the estate (Illustration of 6th Proposition, *infra*).

This was a foreclosure suit against the heir-at-law of a mortgagor, the devisees in trust having disclaimed, and there were no adults before the court who could be in possession of funds to redeem the estate.

Skiffen v. Davis, 1 Kay, App. 21. The court upon motion for a decree for sale in a foreclosure suit in the absence of the infant *cestui que trust*, and of the representative of a deceased defendant, upon an affidavit by the trustee of the settlement, held that it would be for the benefit of the infants, since the court could get rid of the difficulty as to parties by the exercise of its right in ordering the money to be brought into court. (Illustration of 5th Proposition, *infra*).

Sale v. Kitson, 3 De G. M. and G. 119. This was a suit instituted by way of claim by the devisees and executors of a mortgagee, against the beneficial devisees of one moiety and the devisees in trust of the other moiety of the equity of redemption, the latter of whom were also executors of the mortgagor. The court held that the suit might proceed in the absence of the *cestui que trust*, the trustees and executors of the mortgagor being before the court who were the persons having the control of the money (Illustration of 3rd Proposition, *infra*).

Cropper v. Mellersh, 3 W. R. 202. The devisee in trust of an

equity of redemption does not sufficiently represent the *cestui que trust* so as to render it unnecessary to make them parties in a suit to foreclose; the court in this case thinking that if a decree against a trustee might be pleaded against the *cestui que trust*, it would be an eminently unjust proceeding, because it would be depriving them of property without giving them the opportunity of insisting upon their right to redeem or of abandoning that right (Illustration of 2nd Proposition, *infra*). But

In *Wilkins v. Reeves*, 3 W. R. 305, Vice-Chancellor Wood, after referring to *Goldsmid v. Stonehewer*, said that with all deference to the opinion of Vice-Chancellor Stuart, the legislature had directed that trustees should represent the estate of their *cestui que trust*, and the remarks of the learned judge went at the very root of the enactment. He did not see why the rule should not apply to the case of mortgagor and mortgagee.—*The usual decree of foreclosure*.

Fowler v. Baldon, 9 Hare, App. 78. The 44th section 15 & 16 Vict. c. 86, does not empower the court to dispense with a personal representative of a surviving trustee, who in the circumstances of the case should have active duties to perform in the execution of the decree.

The 9th rule is applicable not only to administration suits, but to all suits where the interests of the *cestui que trusts* are represented and their powers vested in the trustee (Illustration of 7th Proposition, *infra*).

Reed v. Prest, 3 W. R. 30. The court will not dispense with the necessity of bringing a party before the court for the purpose of representing *cestui que trusts* under a settlement where the trustees themselves, who take a benefit under the settlement, are charged with fraud in obtaining it (Illust. of 8th Propos. *infra*).

Stansfield v. Hobson, 16 Bea. 189. Where it was held that the trustees of a mortgage represent the *cestui que trust* sufficient to protect the mortgagor; but where the surviving trustees or the representatives of the trustees alone are parties, the court will require the *cestui que trust* to be also represented for the sake of securing the due application of the trust-money.

The practice of serving notice of a decree upon parties interested extends to proceedings under an administration summons at chambers (*Strong v. Moore*, 1 W. R. 509).

From the decisions of the above cases may be deduced the following rules or propositions:—

9th rule, under the 42nd section of the "Chancery Improvement Act," as to *Parties*.

Extension of the 30th order, 26th August, 1861.

The cases upon this rule decide the following points:—

(1) That the trustees of a settlement of mortgaged property leaving no funds applicable to redemption, do not sufficiently represent the *cestui que trust* in a foreclosure suit (*Goldsmid v. Stonehewer*).

(2) That a mere devisee in trust does not in such a suit sufficiently represent the parties interested (*Cropper v. Mellersh*).

(3) That persons who are both trustees and executors under a will do sufficiently represent the beneficiaries in a foreclosure suit, they being in a position to redeem, if redemption is likely to be beneficial (*Hanman v. Riley*).

(4) That the presence of *cestui que trust* when otherwise necessary will sometimes be dispensed with on evidence being given that they have notice of the proceedings and do not object to the proposed decree (*Tudor v. Morris*).

(5) That where the decree asked is sale and not foreclosure, the *cestui que trusts*, though infants, may be dispensed with on evidence that the sale will be for their benefit (*Skiffen v. Davis*).

(6) That where by disclaimer of the trustees the estate had vested in an infant heir, no decree could be made in the absence of the parties interested either for foreclosure or sale (*Young v. Ward*).

(7) That subject to certain exceptions the rule applies to all suits where the interests and powers of the beneficiaries are vested in the trustees (*Fowler v. Baldwin*).

(8) That the trustees do not sufficiently represent the *cestui que trust* in a suit to set aside a settlement and charging the trustees with frauds (*Reed v. Prest*).

APPENDIX C. (p. 310, *supra*.)

15 & 16 Vict. c. 86, secs. 52 & 53.

Revivor and Supplement.

Under sections 52 and 53, several important decisions have been given; for it will be observed that these sections are de-

signed to extend the powers of amending bills, and in certain cases, instead of bills of revivor and supplement, to substitute a new system known as revivor orders and supplemental statements. And first, we may notice that of *Price v. Hamblett*, 1 W. R. 363.

In this case the suit had become defective in consequence of the bankruptcy of a party to the record, and it therefore became necessary to bring the assignees before the court. The old practice in the case of bankruptcy having been to make the assignees parties by means of a supplemental bill, the question was whether it could now be done by means of an amendment, without obtaining an order of revivor. Vice-Chancellor Kindersley was of opinion that whenever there had been no original decree, a supplemental bill was necessary, as no order could be made having the effect of making the assignees parties to the suit, since no supplemental decree could be made without the previous existence of an original decree.

In *Nicholson v. Gibb*, 2 W. R. 337, where after the institution of the suit, but before the decree, both plaintiff and defendant became bankrupts, it was urged that under the 52nd and 53rd sections of the 15 & 16 Vict. c. 86, their assignees could be made parties by annexing a supplemental statement to the bill. But Vice-Chancellor Kindersley said that, as to the application of a supplemental statement under the Act, it had been under consideration, and it was thought to apply to cases where as between plaintiff and defendant circumstances had occurred to affect the rights and position of the parties with respect to the subject-matter of the suit, and not where it was desired to bring new parties before the court. In such a case a supplemental bill was necessary; for although the power to make the assignees parties by amendment might exist, yet that would be a most objectionable and anomalous proceeding. And in the case of *Heath v. Lewis*, 2 W. R. 452, and *Stuart v. Sturgis*, *ib.* 488, where in a foreclosure suit, after replication but before decree, the mortgagor and principal defendant had become insolvent, a motion for leave to file a supplemental statement to bring the facts of insolvency before the court was refused, and the master of the rolls, following the decision of *Nicholson v. Gibb*, ordered a supplemental bill to be filed. In the case of *Heath v. Lewis*, and *Stuart v. Sturgis* (the above foreclosure suit), which had been taken *pro confesso* against a defendant Gahan, the defendant

Lewis, a mortgagor, became insolvent. Leave had been obtained to serve the above-mentioned supplemental bill on the defendant Gahan in Ireland, which was accordingly served. Before a further step was taken Gahan died, having appointed his widow executrix. The court allowed the supplemental bill (the bill in *Stuart v. Sturgis*) to be amended under the 53rd section by stating the facts as to the death of Gahan, and making his executrix a party: it being in fact a bill of revivor and supplement as against her. It is now therefore presumed that whatever difficulty the court may have felt at first in allowing a simple order to amend under the 53rd section where there has been any defect in the suit by reason of bankruptcy, insolvency, or otherwise, yet that the great convenience which must result from dispensing with orders to revive in many cases will induce the judges to follow a liberal construction of the section.

Another subject of discussion arose under the 52nd section, involving much uncertainty and argument, and contradictory decisions: the question being whether the representatives of a deceased accounting party could by means of a supplemental order under sec. 52 be brought before the court, requiring them to admit assets or else to account, or whether that order must be taken as applying only to a common supplemental order for the purpose of carrying on the suit against the new defendants.

The case of *Tate v. Leithead*, 9 Hare, App. 51, appears to have been one of the first upon which the question arose. It was a case in which a special claim was asked for, praying that the personal representatives of a deceased accounting party might admit assets or account in the usual manner. Leave was given, the vice-chancellor saying that this relief was more than that which was given under the usual supplemental decree, and therefore it was not affected by sec. 52.

In *Wilding v. Richards*, 2 W. R. 15, Bird asked under the 52nd section for an order to revive against the personal representatives of one of the defendants, and also for a supplemental decree making him personally accountable for rents alleged to have been received by him. Stuart, vice-chancellor, thought that was not in the words of the Act, and that the order must not extend to the supplemental decree directing an account against the defendant himself. Bird then confined his application to the usual order to revive, which was granted.

In the Dean and Chapter of *Ely v. Hensley*, 1 W. R. 190, a

sole defendant died after appearance but before decree. An application was thereupon made under sec. 52 to obtain the order of revivor and supplement against the executors of a deceased defendant. The order as prepared was to the effect that the suit should be revived against the executors, and that they should admit assets to answer the charge against the testator's estate, or else the common accounts to be taken. The registrar refused, and the master of the rolls said that all the plaintiffs were entitled to was the usual order to revive and carry on the suit against them as if they had been original parties.

But in *Edwards v. Batley*, 19 Bea. 458, it was determined that an order of revivor and supplement may be made as of course under the 52nd section, with the addition that the personal representatives may admit assets in chambers or account. Again, in *Cartwright v. Shepherd*, 20 Bea. 122, by a decree an account was directed against an executor. He died pending the inquiry, but appointed one L. N. his executor. A motion was made for an order to revive and carry on the accounts, and that L. N. might admit assets of the deceased executor or account. The master of the rolls at first doubted whether, consistent with the decisions of the other judges, it could be done, but afterwards made the order.

The case of *Tate v. Leithead* may therefore now be considered as overruled, and the subsequent practice has been to follow in the track of *Edwards v. Batley*, and *Cartwright v. Shepherd*.

After decree, if one desires an account of assets of a deceased accounting defendant from his personal representative, such personal representative may be brought before the court by an order in the nature of a supplemental decree, without filing a supplemental bill (see form of order, 373, *Gardner v. Hulme*, M. R.).

There is another subject also which has proved a source of much discussion and confliction of decisions arising out of the 52nd and 53rd sections of the Act; *i. e.*, Can you by a supplemental statement under 53rd section introduce upon the record facts sufficient indeed to constitute an abatement (but which facts in themselves are too intricate and involve too far the rights of parties to be sustained by mere allegations), and by such statement obtain a supplemental order under sec. 52?

The following cases will serve to illustrate the different views in which the judges have regarded the question:

The case of *Heath v. Chapman*, 1 W. R. 344, was an admini-

stration suit in which a reference to the master had been directed to inquire whether all proper parties were before the court. One of the parties found by the master had since died, and administration had been taken out to his estate and a statement to the effect filed on the record under 44 Gen. Ord. 7th Aug. 1852, and section 53, 15 & 16 Vict. c. 84. An order was asked that one of the solicitors might be deemed and taken as a defendant. The Vice-Chancellor Kindersley said that the old practice must, under these circumstances, be still observed, namely, to file a supplemental bill, to which a short answer must be put in and a decree taken against the administrator.

In *Hart v. Tulk*, 2 W. R. 131, a defendant died *subsequent* to the decree, having devised his interest to his wife and children, and a supplemental statement was filed under 44 Ord. Aug. 1852. The question was whether an order to revive could be obtained as of course after filing the statement. The lord chancellor said that the proper mode of proceeding was to file the statement and then obtain the usual supplemental decree as of course, under section 52: That by making the statement the plaintiff was also entitled *prima facie* to the decree as of course.

In *Commerell v. Hall*, 2 W. R. 285, an application was made also *after* a decree for leave to file a supplemental statement under 53 sec. and 44 Ord. Aug. 7, 1852. The Vice-Chancellor Kindersley said that he had consulted with the other equity judges, and had also taken the opinion of the different officers of the court, and the result was, that the 53rd section of the Chancery Improvement Act, which authorized filing a supplemental statement, could not apply after a decree made in any case, as any supplemental statement, in order to form a *substratum* for an order, must be in the nature of a supplemental decree, as if new parties were made by way of supplement. His honour moreover stated "that there was said to have been a case in which a supplemental statement was made after a decree; the question arose how the matter was to be dealt with, and when the cause came on either before the lord chancellor or lords justices, it was found so impossible to get on with it that they took the supplemental statement off the file, and therefore the order then asked could not be made. Nor did the 53rd section apply *before* decree to bring new parties before the court, but only to the statement of new facts between the same parties. When it was desirable to bring new parties before the court a supplemental bill must be filed" (S. C. Drew, 196). It will be observed that his

honour held the same opinion, with respect to the necessity of a supplemental bill where new parties were introduced, as he did in *Nicholson v. Gibb*, which was followed by the master of the rolls in *Heath v. Lewis*, *ante*; both which positions have been since overruled.

Thus the lord chancellor, in *Lash v. Miller* (4 De Gex, M. and G. 841; 19 Jur. 457), made a supplemental order against the assignees of a bankrupt defendant. In this case the defendant became bankrupt after appearance, but before answer and before decree. The lord chancellor ordered that the plaintiff should be at liberty under the 52nd section to prosecute the suit in the same manner against the assignees without filing a bill of revivor or supplement, as he could have done against the bankrupt at the time of his bankruptcy. The assignees at liberty to answer bill.

This case has been followed by *Pickford v. Brown*, 1 Kay and J. 643, and *Hall v. Clive*, 575. In the former the suit became defective before decree by the birth of a child who was a necessary party as defendant, whereupon an application was made under the 52nd section for a supplemental order against the infant (counsel saying that *Commerell v. Hall*, which decided that a supplemental bill must be filed to bring new parties before the court *before* decree, had been overruled by a recent decision of the lords justices). Vice-Chancellor Wood, after consultation with the other judges, made the order.

The latter case of *Hall v. Clive* was one wherein it was moved under the 52nd section for an order of revivor and supplement in consequence of the death of one of two co-plaintiffs before decree. *Lash v. Miller* was cited, and the master of the rolls made an order that the surviving plaintiff might carry on the proceedings against the executors and devisees.

Where, as in *Jervoise v. Clerk*, 2 W. R. 337, by circumstances which have occurred *after* decree, a co-plaintiff falls into such a position as to render it expedient for him to become a defendant; the last defendant on the record having died, a supplemental bill was deemed to be necessary. Such a case being quite out of the ordinary course, the common order to revive under section 52 did not apply. The case of *Atkinson v. Parker*, 2 De Gex, M. and G. 221, was referred to. It was where an infant plaintiff had married pending the suit, and after a decree the court granted a supplemental order bringing the trustees of the marriage settlement before the court. Lord Justice K. Bruce, in which the lord chancellor concurred, said that although, strictly

speaking, the case was not within the 52nd section, it was certainly within its spirit.

The case of *Wilson v. Auchterlony*, 1 W. R. 34, was an administration suit wherein the master had found certain incumbrancers on the estate to be administered who ought to be made parties. An application was thereupon made under section 52 for an order to the effect of the usual supplemental decree to bring them before the court. Vice-Chancellor Stuart said that he had spoken to the other judges upon the subject, and there seemed to be considerable difficulty in understanding what the words "supplemental decree" there meant as applied to the other language of the Act, and thought it to be reasonably clear that those words did not apply to the case of an incumbrancer, as the fact of his being such must be put in issue.

A petition is also within the 53rd section of the Act, as in the case of *Robinson v. Hewetson*, 1 W. R. 100; and where the female petitioner, after the preparation and stamping of the petition for payment of money out of court, married, the court allowed an amendment of the petition for the purpose of making the husband and wife co-petitioners. *Grimston v. Oxley*, *ibid.*; *Bonfil v. Purchas*, 1 W. R. 13; *Petre v. Petre*, 1 W. R. 362; *Merritt v. Walton*, 2 W. R. 544; *Martin v. Purnell*, 3 W. R. 395, and *Phippen v. Brown*, 19 Jur. 698, are all cases showing that the order to revive under the 52nd section is of course.

In the case of *Langdale v. Gill*, 16 Jur. 1041, it was determined that the court will not, upon the defendant's petition, direct the plaintiff to enter upon the record a statement of supplemental matters under section 53 and Ord. 44, 7th Aug. 1852. This was a petition by a defendant and her husband, and the trustees of her marriage settlement, for the payment of the dividends of a fund in court to the wife for her separate use, and that plaintiff might be decreed to enter upon the record the marriage of "the said defendant and her husband," "and the nature and effect of her marriage settlement." The dividends had been ordered to be paid to defendant by her maiden name during her life or further order. Since this order the defendant had married, and the fund had been settled by the settlement in question.

Vice-Chancellor Stuart thought the order not necessary; that it was a novelty to give a defendant the means of amending the plaintiff's bill. The plaintiff was *dominus litis* to that extent certainly. The only order that could be made with safety would be for payment of the dividends.

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